STATE OF WISCONSIN

IN SUPREME COURT

No. 01-0272-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

JOHN P. HUNT,

Defendant-Appellant.

ON PETITION FOR REVIEW OF A DECISION OF THE WISCONSIN COURT OF APPEALS

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT-PETITIONER STATE OF WISCONSIN

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BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER STATE OF WISCONSIN

QUESTIONS PRESENTED

1. Does the "other acts" test of *State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998), require an appellate court to reverse a judgment of conviction when (a) the circuit court admits the evidence after hearing and agreeing with a *Sullivan* analysis from one party, but does not, according to the appellate court, adequately state its own *Sullivan* analysis, and (b) the record itself supports the circuit court's exercise of discretion?

   - The court of appeals answered "Yes."
   - This court should answer "No."

2. Does *Sullivan* require reversal of a judgment of conviction when the circuit court, referring to the *Sullivan* test, specifically finds proffered other-acts evidence admissible for five permissible purposes (motive, opportunity, absence of mistake or accident, intent, and context), but erroneously describes the evidence to the lawyers (though not to the jury) as also admissible for a sixth, improper purpose (propensity)?

   - The circuit court answered "Yes."
   - This court should answer "No."

3. Assuming a circuit court erroneously applies the *Sullivan* test and improperly admits other-acts evidence, does a *Sullivan* violation require reversal of all counts in a judgment of conviction, including those as to which other-acts evidence could not have had any impact?

   - The circuit court implicitly answered "Yes."
   - This court should answer "No."

POSITION ON ORAL ARGUMENT AND PUBLICATION OF THE COURT'S OPINION

The court's decision to grant the petition for review shows that the court believes resolution of the issues will significantly develop the law in Wisconsin. The State therefore believes the court will find oral argument helpful as a way to explore the issues beyond the parties' presentations in their briefs. The State also believes the court's opinion, by developing Wisconsin law, will merit publication.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The convictions in this case arose from conduct occurring in a functionally (but not legally) bigamous household over which defendant-appellant John Patrick

Hunt presided in Milwaukee. Hunt lived in this house with his legal wife, Ruthie Hunt (73:22), and their children: John Marks, Cleopatrick Marks, and Jennifer Patrick Marks, all born before her marriage to Hunt in 1982 (73:24, 27), and Ruthie LittleNeal Patrick Hunt, Cecillia Patrick Hunt, and John Patrick Hunt II, all born after the marriage (73:25-28).

In addition to Ruthie and her children, Hunt lived in the house with Angelica Johnson and her children: Tiffany, Lana, and April, all born or *in utero* before Angelica moved into the house in July 1988 (73:32-34), and Jermaine Patrick Johnson, John Patrick Hunt IV, and John Patrick Hunt V, all children fathered by Hunt after Angelica moved into the house (73:35).

Hunt, Ruthie, and Angelica all described Angelica as Hunt's "wife" (73:29, 37; 74:14, 16; 76:210), and all the children would call Ruthie and Angelica "mama" (73:65-66). Ruthie regarded Hunt's relationship with Angelica, a relationship that included sexual intercourse, as "acceptable" (73:31).

On July 23, 1998, Tiffany, then fifteen years old, gave birth to Isaiah Patrick Hunt (73:42). Tiffany told Ruthie on more than one occasion, both at the hospital and during her pregnancy, that she did not want the baby (73:43). At the hospital during Isaiah's birth, Hunt described himself to both Dr. Kathy Hernandez and Connie Cordelli, a registered nurse, as Tiffany's father (72:169; 73:17).

On September 21, 1999, Hunt oversaw a household of twelve other people: two "wives" (Ruthie and Angelica), and ten children (73:47-48).[1] On that night, everyone except Hunt left the residence together to return some

[1] Ruthie identified the following children as residing in the house: Tiffany and her son (Isaiah), Lana, April, Jermaine, John IV, John V, Ruthie LittleNeal, Cecillia, and John II (73:47-50).

videotapes to Blockbuster and to shop at K-Mart (73:57). The group then drove to the Milwaukee police station on Fond du Lac Avenue, where they arrived sometime between 10:00 p.m. and 11:00 p.m. (73:58; 74:195).

At the police station, Ruthie told Milwaukee police officers Dean Newport and Shaun Doyne (74:193-94) "that her husband, who she identified to us as John P. Hunt, had threatened her and the other 11 people in the house, threatened their lives and that she wanted us to escort her home to make sure that nobody was harmed." The officers "followed Miss Hunt and everyone else home to 2433 North 22nd Street," arriving there about 11:30 p.m. (74:195).

Officer Newport instructed Ruthie to park about a half-block from the house for "safety reasons" (74:196). There, Officer Newport conducted "an in-depth interview with Ruthie Hunt" (74:196):

> [S]he went in-depth on the threat. She said that her husband, John P. Hunt, has a serious crack problem and he smokes crack all the time. She said that that night about 5:30 PM he just started yelling for about a half hour, and then around 6 he told everyone they have got to get out of the house or else if they didn't he would kill them while they were sleeping.
>
> . . . .
>
> . . . She said she was deathly afraid of him.
>
> . . . .
>
> . . . [S]he told me that he carries around weapons when he smokes crack and he has weapons all over the house.
>
> . . . .
>
> . . . She stated that at times John P. Hunt would get so high on crack that he would lay down on his belly and act like a snake.
>
> . . . .

She stated that . . . she felt like she was a prisoner in her own home. She kind of went through the daily routine, a daily routine that she has everyday living in this house. Initiallly [*sic*] she described the house as a single family house with a basement, a first floor and then a second floor that has three bedrooms. She said that when John P. Hunt smokes crack, everyone in the house except him has to stay on the second floor. She says that he smokes crack from about 7 PM to 6 AM in the morning, and that when he smokes crack he barricades both the front and back door and nobody could come downstairs. She told me that if they had to go to the bathroom they had to use buckets that they had and everyone would use those buckets. They couldn't go downstairs to use the toilet at all.

. . . .

. . . . [H]er and the occupants in the house would use the buckets because they couldn't go downstairs on John P. Hunt's first floor. They had to stay upstairs. They also had a wash bucket. There was no bathroom facility upstairs at all, just three bedrooms and they had to wash up in there. She said when he goes to sleep at night everyone still has to stay upstairs, and then they had to be quiet.

. . . .

. . . She told me that she was deathly afraid of him.

(74:196-99.)

After finishing the interview, Officers Newport and Doyne "went to the residence . . . and knocked on the front door to arrest Mr. Hunt" (74:199).

[S]hortly thereafter he answers the door, opens it, lets us in, and then after we enter a dining room right after you enter through the door and there is a table there. Mr. Hunt sat down at the table, started yelling biblical scriptures at us while he was holding the Bible up in the air. We then took him into custody and escorted him out to the police squad.

. . . .

Upon entering the dining room, you can smell burnt crack cocaine. Mr. Hunt couldn't keep-- it wasn't a rational conversation at all. He wouldn't listen to our directives. He would just go off and be incoherent on what we are saying.

> He was profusely sweating and didn't seem like he had any type of concentration or there was no-- no communication skills whatsoever.

(74:199-200.)

While Officer Doyne "maintained custody of Mr. Hunt in the squad [car]," Officer Newport "escorted the family back into the house" (74:202). Ruthie took Officer Newport on a tour of the house, showing him a big speaker Hunt used to barricade the door, taking Officer Newport upstairs to see the "makeshift toilet," and "point[ing] out the weapons that [Hunt] carries" (74:202). The buckets contained urine or feces and toilet paper, or some combination (74:209).

After completing the tour and some additional interviewing of Ruthie (74:209-10), Officer Newport interviewed Angelica at the dining room table (74:211):

> I asked her if she was threatened tonight, and she said she was, that she knew John P. Hunt for about 8 to 9 years, and that they have also been having intercourse the same amount of time. She told me that she has three children by John P. Hunt, and she gave me the children's names as, I believe, a Jermaine P. Johnson, and then a John P. Hunt IV and John P. Hunt V. She said that she is truly scared of John P. Hunt I.

(74:211-12.) Within seconds of finishing his interview of Angelica, Officer Newport interviewed Tiffany:

> The incident that night. She said that John P. Hunt had threatened her that night, and that he has hit her in the past. She says that he does smoke crack cocaine and that when he smokes he carries a hammer or a metal bar and that she is scared of him. She says that she had intercourse with John P. Hunt for about a year and the last time she had intercourse with him was 5 days prior to that. She also told me that she shares a baby who she identified as Isaiah P. Hunt with John P. Hunt. She said that when he smokes crack he will call her down from the second floor to the first floor and then have intercourse with her, and then she told me that she is scared to say no because then he will hit her.
>
> . . . .

> She was-- appeared to me she was genuine. I can see that she was relieved that John P. Hunt was under arrest, and she was very straightforward, answered my questions, and she was very relaxed and calm like she was relieved that the police are finally here and doing something.
>
> . . . .
>
> She said she was scared of him.

(74:212-14.) Finally, Officer Newport interviewed Lana:

> I asked Lana if Mr. Hunt had ever indecently touched her, and she says, no, that she usually keeps to herself and he kind of leaves her alone. She said that John P. Hunt does smoke crack, and when he does smoke crack that he will either call Tiffany or Angelica downstairs to have sex with them. She said that she had seen John P. Hunt standing over people with a hammer in his hand watching them sleep. She said that she was scared living in that house, and she didn't want to live there.

(74:215.)

Officer Newport estimated that he finished the interviews around 12:30 a.m. on September 22 (74:215). He notified his district lieutenant that the case required the assistance of the Sensitive Crimes Division because of "John P. Hunt having sexual intercourse with a minor, who would be Tiffany Johnson at that time" (74:215-16).

On September 25, 1999, the Milwaukee County district attorney filed a criminal complaint (2) charging Hunt with the six counts of which the jury eventually convicted him.

On December 16, 1999, the Milwaukee County district attorney filed an information (8) reiterating the charges in the criminal complaint.

On February 28, 2000, the prosecutor filed motions in limine (16; Pet-Ap. 114-17). The motions sought, among other things, permission to use other-acts evidence (16:3-4; Pet-Ap. 116-17), including evidence that Hunt had

physically and sexually abused Ruthie during periods he also sexually abused Tiffany (16:3; Pet-Ap. 116) and that Hunt physically abused both Tiffany and Angelica (16:3-4; Pet-Ap. 116-17). The prosecutor described the evidence about physical abuse as "relevant to the 'context' in which the sexual assaults occurred, and also part of the corpus of crimes with which [Hunt] is charged. They also relate directly to the victim's state of mind" (16:4; Pet-Ap. 117 (citing *State v. C.V.C.*, 153 Wis. 2d 145, 450 N.W.2d 463 (Ct. App. 1989)).

On March 20, 2000, Hunt filed a brief in opposition to the prosecutor's other-acts motion (22).

On June 16, 2000, the prosecutor filed supplemental motions in limine (33; Pet-Ap. 117a) seeking admission of evidence that Hunt used drugs. In the motion, the prosecutor offered three reasons for admitting this other-acts evidence: "it is part of the corpus of the crimes charged, in that [Hunt] was using drugs during or before the sexual abuse to Tiffany Johnson"; for context ("provides necessary background for understanding and evaluating Hunt's behavior"); and for corroboration of "the information provided to the police by the parties at the time of the investigation. Since the victims are recanting, as well as other family witnesses, evidence which provides an independent source of information about the credibility of their various stories is highly relevant."

On June 19, 2000, the circuit court held a pretrial-motions hearing (71) in which the lawyers and the court addressed the prosecutor's other-acts request (71:27-41, 55-61; Pet-Ap. 118-32f).[2] During the hearing, the prosecutor reiterated the original reasons offered (71:28-34; Pet-Ap. 119-25) and further highlighted the

[2] Hunt's lawyer orally objected to the prosecutor's motion to admit evidence of Hunt's drug use (71:55; Pet-Ap. 132a).

importance of the evidence to help the jury understand the recantations by various witnesses (71:30-32, 57-58; Pet-Ap. 121-23, 132c-132d). The prosecutor also argued that the evidence demonstrated "the absence of mistake or accident on the part of the defense" (71:34; Pet-Ap. 125) and provided the jury with a complete understanding of the circumstances of the case (71:59; Pet-Ap. 132e).

After hearing the arguments, the circuit court, explicitly referring to the *Sullivan* test (71:38, 61; Pet-Ap. 129, 132g), allowed the evidence, finding it relevant for several purposes:

- showing the context in which events (including the widespread recantations) occurred in the case (71:38, 40; Pet-Ap. 129, 131)[3]
- opportunity (71:37, 40; Pet-Ap. 128, 131)
- intent (71:37, 40, 60; Pet-Ap. 128, 131, 132f)
- absence of mistake or accident (71:38, 40; Pet-Ap. 129, 131)
- motive (71:40, 60; Pet-Ap. 131, 132f)

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[3] Although the court correctly recognized the permissibility of using other-acts evidence to show context, *see infra* note 7, the court also stated only to the lawyers, not the jury, that the evidence could permissibly "show whether or not [Hunt] acted in conformity therewith" (71:38; Pet-Ap. 129). To the extent this comment suggests other-acts evidence can permissibly show conformity with a character trait, the circuit court erred. *See, e.g., State v. Gray*, 225 Wis. 2d 39, 49, 590 N.W.2d 918 (1999). The prosecutor never offered the evidence for that purpose, and the court's jury instructions admonished the jury not to use the evidence for that purpose (77:18-20; Pet-Ap. 141-43). In any event, so long as the court properly admitted the evidence despite an erroneous rationale, an appellate court can still affirm the decision or order. *See, e.g., State v. Holt*, 128 Wis. 2d 110, 124-25, 382 N.W.2d 679 (Ct. App. 1985).

After reviewing these permissible grounds for admitting other-acts evidence, the court said: "So for those four reasons the Court feels that the other acts evidence that were specifically identified plus the contextual aspect will be allowed in this case" (71:40; Pet-Ap. 131). The court also noted that the "greater latitude rule" allowed for admitting other-acts evidence in a case involving a sexual assault on a child, as occurred here (71:39-41; Pet-Ap. 130-32).

At trial, the prosecutor, confronting wholesale recantations by the Hunt "family" witnesses, introduced the other-acts evidence to establish the context in which the crimes occurred and to establish a context for understanding the recantations.

In addition, to prove the charge of first-degree sexual assault resulting in the pregnancy of a child, the prosecutor introduced DNA evidence of Hunt's paternity of Isaiah. The DNA test, which examined Hunt, Tiffany, and Isaiah (73:222), established "[t]he likelihood of paternity in this case [as] 99.989% .... [Hunt] is 99% more likely to be the father than someone else out there" (73:239; *see also* 73:241, 250-51). Hunt denied all allegations of sexual contact with Tiffany (76:207, 231-33), but he did not present any scientific or expert evidence to rebut the results of the DNA test.

During the jury instruction conference, the circuit court and the lawyers discussed an adapted version of Wis. JI-Criminal 275, the pattern instruction on other-acts evidence (76:254-61; Pet-Ap. 133-40). In the wake of the trial testimony, the court reiterated the original permissible bases for allowing the other-acts evidence and went on to include "preparation or plan" as an additional permissible purpose for which the jury could consider the evidence (76:256; Pet-Ap. 135).

The court read the instruction to the jury (77:18-20; Pet-Ap. 141-43). Contrary to the court of appeals'

unequivocal declaration that the circuit court did not give a cautionary instruction warning the jury not to use other-acts evidence for propensity purposes, *State v. Hunt*, No. 01-0272-CR, slip op. at 6 (Wis. Ct. App. July 17, 2002) ("it gave no such instruction"), Pet-Ap. 106, the circuit court specifically warned the jury twice on that point:

> You may not consider this evidence to conclude that the defendant has a certain character or a certain character trait and that the defendant acted in conformity with that trait or character with respect to the offenses charged in this case. ...
>
> . . . .
>
> You may consider this evidence only for the purposes I have described, giving it the weight you determine it deserves. It is not to be used to conclude that the defendant is a bad person and for that reason is guilty of the offense or offenses charged.

(77:19-20; Pet-Ap. 142-43.)

On June 23, 2000, the jury convicted Hunt on all charges (41; 42; 43; 44; 45; 46; 77:105-09).

On Hunt's appeal, the court of appeals summarily reversed all six counts. The court held that the circuit court committed two errors. First, during the pretrial-motions hearing without the jury present, the circuit court stated that the evidence "also goes . . . to show whether or not he acted in conformity therewith" (71:38; Pet-Ap. 129) — a clearly erroneous basis for admitting other-acts evidence, as the State conceded, *see* State's Court of Appeals Brief at 10 n.5 [hereinafter State's CA Brief]. Ignoring the permissible bases on which the circuit court held the other-acts evidence admissible, the court of appeals concluded that this rationale — never heard by the jury and specifically denounced in the jury instructions — required reversal.

Second, the court of appeals concluded that the circuit court erroneously applied the greater-latitude rule for admitting other-acts evidence in cases involving sexual

assaults on children, as occurred here (71:39-41; Pet-Ap. 130-32). The court of appeals described the evidence as "*probably* not admissible under the greater latitude rule," *Hunt*, slip op. at 6, Pet-Ap. 106 (emphasis added). The court of appeals acknowledged that "some of the other-acts evidence may have been admissible under various rationales, [but] the circuit court failed to undertake the careful item-by-item analysis required by *Sullivan*[.]" *Id.* at n.5, Pet-Ap. 106 n.5. The court of appeals, however, did not conduct its own independent review of the record as required by, among many other cases, *State v. Davidson*, 2000 WI 91, 236 Wis. 2d 537, ¶ 53, 613 N.W.2d 606 (citing *Sullivan*).

Additional facts will appear, as necessary, in the "Argument" portion of this petition.

STANDARD OF REVIEW

> The applicable standard for reviewing a circuit court's admission of other acts evidence is whether the court exercised appropriate discretion. *See State v. Pharr*, 115 Wis. 2d 334, 342, 349 N.W.2d 498 (1983). An appellate court will sustain an evidentiary ruling if it finds that the circuit court examined the relevant facts; applied a proper standard of law; and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach. *See Loy v. Bunderson*, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982) (citing *McCleary v. State*, 49 Wis. 2d 263, 182 N.W.2d 512 (1971)).
>
> A circuit court's failure to delineate the factors that influenced its decision constitutes an erroneous exercise of discretion. *See McCleary*, 49 Wis. 2d at 282. When a circuit court fails to set forth its reasoning, appellate courts independently review the record to determine whether it provides a basis for the circuit court's exercise of discretion. *See Pharr*, 115 Wis. 2d at 343.

Sullivan, 216 Wis. 2d at 780-81. An appellate court can consider acceptable purposes for the admission of evidence other than those contemplated by the circuit court, *id.* at 784-85, and can affirm for reasons other than those stated by the circuit court, *State v. Holt*, 128 Wis. 2d

110, 125, 382 N.W.2d 679 (Ct. App. 1985). "Regardless of the extent of the trial court's reasoning, we will uphold a discretionary decision if there are facts in the record which would support the trial court's decision had it fully exercised its discretion." *State v. Shillcutt*, 116 Wis. 2d 227, 238, 341 N.W.2d 716 (Ct. App. 1983), *aff'd on other grounds*, 119 Wis. 2d 788, 350 N.W.2d 686 (1984).

SUMMARY OF THE STATE'S POSITION

The court of appeals erred when, without conducting an independent review of the record, it reversed Hunt's convictions because, in the appellate court's view, the circuit court did not adequately explain its reasons for exercising discretion to admit other-acts evidence. The court of appeals also erred when it ignored permissible bases for admitting the other-acts evidence and instead focused on two other reasons, one clearly impermissible, the circuit court offered for allowing admission of the evidence. Finally, the court of appeals erred when, after failing to conduct an independent review of the record, it reversed a count as to which the other-acts evidence objectively did not have any impact and as to which even Hunt never argued the circuit court's other-acts ruling had any impact.

ARGUMENT

I. BY FAILING TO CONDUCT THE INDEPENDENT REVIEW OF THE RECORD AS REQUIRED BY *SULLIVAN* AND MANY OTHER CASES, THE COURT OF APPEALS ERRONEOUSLY REVERSED THE CIRCUIT COURT'S ADMISSION OF OTHER-ACTS EVIDENCE AND, THEREFORE, ERRONEOUSLY REVERSED HUNT'S CONVICTIONS.

A. Establishing the context: *Sullivan*'s three-step analytical framework.

In *Sullivan*, 216 Wis. 2d 768, this court identified a "three-step analytical framework," *id.* at 772, for deciding the admissibility of other-acts evidence:

> (1) Is the other acts evidence offered for an acceptable purpose under Wis. Stat. § (Rule) 904.04(2),[4] such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident?
>
> (2) Is the other acts evidence relevant, considering the two facets of relevance set forth in Wis. Stat. § (Rule) 904.01? The first consideration in assessing relevance is whether the other acts evidence relates to a fact or proposition that is of consequence to the determination of the action. The second consideration in assessing relevance is whether the evidence has probative value, that is, whether the other acts evidence has a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence.
>
> (3) Is the probative value of the other acts evidence substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence? *See* Wis. Stat. § (Rule) 904.03.

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[4] Unless indicated otherwise, all citations to Wisconsin Statutes refer to the 1997-1998 edition.

Id. at 772-73 (footnote omitted).

To implement *Sullivan*'s decisional framework, the court instructed judges and lawyers on their responsibilities:

> The proponent and the opponent of the other acts evidence must clearly articulate their reasoning for seeking admission or exclusion of the evidence and must apply the facts of the case to the analytical framework. The circuit court must similarly articulate its reasoning for admitting or excluding the evidence, applying the facts of the case to the analytical framework. This careful analysis is missing in the record in this case and has been missing in other cases reaching this court. Without careful statements by the proponent and the opponent of the evidence and by the circuit court regarding the rationale for admitting or excluding other acts evidence, the likelihood of error at trial is substantially increased and appellate review becomes more difficult. The proponent of the evidence, in this case the State, bears the burden of persuading the circuit court that the three-step inquiry is satisfied.

Id. at 774.

If the circuit court does not explicitly set forth its *Sullivan* analysis, an appellate court reviewing the circuit court's other-acts decision must conduct an independent review of the record: "A circuit court's failure to delineate the factors that influenced its decision constitutes an erroneous exercise of discretion. . . . When a circuit court fails to set forth its reasoning, appellate courts independently review the record to determine whether it provides a basis for the circuit court's exercise of discretion." *Id.* at 781 (citations omitted).

Thus, an appellate court's obligation to conduct an independent review arises at precisely the point a circuit court fails to fulfill its obligation to explain its discretionary decision.

B. The independent-review doctrine: *Sullivan*'s antecedents and progeny.

As shown in the flowchart in the State's appendix (Pet-Ap. 147), the independent-review doctrine invoked in *Sullivan* traces to this court's decision in *McCleary v. State*, 49 Wis. 2d 263, 182 N.W.2d 512 (1971).[5] In *McCleary*, this court wrote about the discretionary act of sentencing:

> [S]entencing is a discretionary judicial act and is reviewable by this court in the same manner that all discretionary acts are to be reviewed.
>
> In the first place, there must be evidence that discretion was in fact exercised. Discretion is not synonymous with decision-making. Rather, the term contemplates a process of reasoning. This process must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards. As we pointed out in *State v. Hutnik* (1968), 39 Wis. 2d 754, 764, 159 N.W.2d 733, ". . . there should be evidence in the record that discretion was in fact exercised and the basis of that exercise of discretion should be set forth."

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[5] *McCleary* does not cite any authority for an appellate court to conduct an independent review of a circuit court's discretionary decision. Nonetheless, some form of independent review of discretionary actions by circuit courts existed, at least implicitly, in cases antedating *McCleary*. *See, e.g.*, *State v. Selbach*, 268 Wis. 538, 540, 68 N.W.2d 37 (1955) ("[a] review of the record does not indicate any abuse of discretion" in trial court's decision not to find good cause to admit testimony of witnesses supporting defendant's alibi defense when statutorily required written notice of alibi defense not given to district attorney); *State v. Kluck*, 223 Wis. 381, 387, 269 N.W. 683 (1936) (supreme court reviews record and writes that "there is nothing in the record showing any abuse of discretion on the part of the trial court in denying the [defendant's] motion for a separate trial"); *Fenelon v. State*, 198 Wis. 247, 251, 223 N.W. 833 (1929) (supreme court reviews record and holds that trial court did not erroneously exercise discretion when denying defendant's motion for a new trial).

> A similar rule is applicable in the exercise of judicial discretion in a civil case where damages are disputed in motions after verdict. We have held that we will not upset a post-verdict damage determination by a trial judge unless there is an abuse of discretion. In *Boodry v. Byrne* (1964), 22 Wis. 2d 585, 589, 126 N.W.2d 503, we stated that, ". . . this court will not find an abuse of discretion if there exists a reasonable basis for the trial court's determination . . . ." In cases where the trial judge has failed to set forth his reasons, we examine the record *ab initio* to resolve the post-verdict damage questions. Unless there is evidence that the trial judge has undertaken a reasonable inquiry and examination of the facts as the basis of his decision, his decision will be disregarded by this court. Such a decision on its face shows an abuse of discretion for failure to exercise discretion.
>
> The same rationale is applicable in reviewing a criminal sentence. We have frequently stated that we will remand for sentencing or modify the sentence only when an abuse of discretion clearly appears. By this we mean that this court should review and reconsider an allegedly excessive sentence whenever it appears that no discretion was exercised in its imposition or discretion was exercised without the underpinnings of an explained judicial reasoning process.

Id. at 277-78.

> [T]he failure to exercise discretion (discretion that is apparent from the record) when discretion is required, constitutes an abuse of discretion. We will not, however, set aside a sentence for that reason; rather, we are obliged to search the record to determine whether in the exercise of proper discretion the sentence imposed can be sustained. It is not only our duty not to interfere with the discretion of the trial judge, but it is, in addition, our duty to affirm the sentence on appeal if from the facts of record it is sustainable as a proper discretionary act.

Id. at 282.

In the cases along the paths from *McCleary* to *Sullivan* (Pet-Ap. 147), this court has invoked this independent-review doctrine:

- "In *McCleary v. State*, 49 Wis.2d 263, 182 N.W.2d 512 (1971), this court held that

sentencing was an act of judicial discretion, and unless the trial judge set forth the facts of record and the process of reasoning by which the sentence was determined, the sentence would be reversed as an abuse of discretion. This holding was subject to this court's duty to uphold the sentencing decision if the supporting facts were apparent in the record." *Klimas v. State*, 75 Wis. 2d 244, 247, 249 N.W.2d 285 (1977).

- "The trial court made no explicit determination that the probative value of the evidence was not outweighed by its possible prejudicial effect. In deciding whether to allow other-conduct evidence, it is not enough that the evidence fall within one of the exceptions to the other-conduct rule; the trial court must also exercise its discretion to determine whether any prejudicial effect of the evidence outweighs its probative value. . . . [T]his court will uphold a discretionary decision of the trial court if the record contains facts which would support the trial court's decision had it fully exercised its discretion." *Hammen v. State*, 87 Wis. 2d 791, 799-800, 275 N.W.2d 709 (1979) (citations omitted).

- "In the instant case the record indicates that, while the trial court considered relevant Wisconsin case law in finding the evidence of [the defendant]'s prior acts admissible, it failed to identify the specific exception to sec. 904.04(2), Stats., upon which it based its decision. Nor did the trial court set forth a reasoned explanation for its conclusion that such evidence was relevant or that its probative value outweighed its prejudicial effect. The failure of the trial court to set forth its reasoning requires us to independently review the evidence to determine whether it supports the trial court's decision." *State v. Alsteen*, 108

Wis. 2d 723, 728, 324 N.W.2d 426 (1982) (citing *McCleary* and *Hammen*).

- "[W]e hold that, where the trial court fails to set forth its reasoning in exercising its discretion to admit evidence, the appellate court should independently review the record to determine whether it provides a basis for the trial court's exercise of discretion. *See State v. Alsteen*, 108 Wis. 2d 723, 728, 324 N.W.2d 426 (1982); *Hammen v. State*, 87 Wis. 2d 791, 800, 275 N.W.2d 709 (1979); *McCleary v. State*, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971). Because we hold the court of appeals should have independently reviewed the record, our review will encompass only the original record as it was presented to the court of appeals on the first appeal." *State v. Pharr*, 115 Wis. 2d 334, 343, 349 N.W.2d 498 (1983).

Since deciding *Sullivan*, this court and the court of appeals (mostly in unpublished opinions) have consistently invoked the independent-review doctrine when circuit courts do not explain the reasons for discretionary decisions:

- "[T]he trial court's exercise of discretion will be sustained if the trial court reviewed the relevant facts; applied a proper standard of law; and using a rational process, reached a reasonable conclusion. *Sullivan*, 216 Wis. 2d at 780-81. If the trial court failed to articulate its reasoning, an appellate court will review the record independently to determine whether there is any reasonable basis for the trial court's discretionary decision. *Id.* at 781; *State v. Gray*, 225 Wis. 2d 39, 51, 590 N.W.2d 918 (1999)." *Davidson*, 236 Wis. 2d 537, ¶ 53.

- "[T]he admission of other acts evidence is a matter entrusted to the sound discretion of the

circuit court, and will be sustained on appellate review if the record reflects that the circuit court 'examined the relevant facts; applied a proper standard of law; and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach.' *State v. Sullivan*, 216 Wis. 2d 768, 780-81, 576 N.W.2d 30 (1998). If the circuit court failed to articulate its reasoning, we independently examine the record to determine if there was a reasonable basis for the circuit court's decision. *Id.* at 781." *State v. Derango*, 2000 WI 89, 236 Wis. 2d 721, ¶ 37, 613 N.W.2d 833.

- "In evidentiary matters, a trial court's failure to set forth the basis for its ruling whether to admit or refuse to admit evidence constitutes an erroneous exercise of discretion. *State v. Sullivan*, 216 Wis. 2d 768, 781, 576 N.W.2d 30 (1998). When such failure occurs, however, we are required to independently review the evidence to determine whether it supports the trial court's decision. *State v. Alsteen*, 108 Wis. 2d 723, 728, 324 N.W.2d 426 (1982)." *State v. Opalewski*, 2002 WI App 145, 256 Wis. 2d 110, ¶ 7, 647 N.W.2d 331.

See also, e.g., State v. Scheidell, 227 Wis. 2d 285, 306, 595 N.W.2d 661 (1999); *State v. Gray*, 225 Wis. 2d 39, 50, 590 N.W.2d 918 (1999).

C. The circuit court conducted an adequate *Sullivan* analysis.

The State disagrees with the court of appeals' view that the circuit court did not follow *Sullivan*'s three-step analysis. When the circuit court made its decisions on the admission of the other-acts evidence, the court explicitly referred to *Sullivan* as the basis for its decisions (71:38, 61; Pet-Ap. 129, 132g). The court recognized that the prosecutor offered the evidence for permissible purposes

(71:37-38; Pet-Ap. 128-29), briefly explained the relevance of the evidence to the issues in the case (71:38-40; Pet-Ap. 129-31), and briefly explained why unfair prejudice did not substantially outweigh the probative value of the evidence (71:38; Pet-Ap. 129).

By going through these steps, the circuit court both satisfied *Sullivan* and showed that it exercised discretion when making its decisions. *See, e.g.*, *State v. Lomax*, 146 Wis. 2d 356, 359, 432 N.W.2d 89 (1988) ("A discretionary determination 'must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination.'"); *State v. Edmunds*, 229 Wis. 2d 67, 74, 598 N.W.2d 290 (Ct. App. 1999) (appellate court will uphold circuit court's discretionary decision if circuit court examined the relevant facts of record, applied the correct legal standard to them, and reached a conclusion a reasonable judge could reach).

Sullivan does not require a circuit court to do anything more than the court did here, and the circuit court did not do anything less. The court of appeals might have preferred more detail, but the court of appeals' preference cannot justify reversing judgments of conviction when a circuit court has, as here, satisfied at least the minimum required standards.

D. The court of appeals did not independently review the record to determine whether it supported the circuit court's decision to admit the other-acts evidence the State wanted to use.

Perhaps, however, the circuit court did not engage in a satisfactory *Sullivan* analysis. If so, that failure still did not justify reversing Hunt's convictions. As shown by the foregoing review (pp. 16-20, above), a circuit court's failure to explain on the record the reasons for a discretionary decision obligates an appellate court to make

an independent review of the record to find evidence, if it exists, that will support the circuit court's decision. Here, however, the court of appeals treated the circuit court's failure as a justification for not making an independent review.

The court of appeals' failure to make an independent review shows at several points in the court's summary disposition. First, the court of appeals did not even hint at an obligation to conduct an independent review. The court's opinion does not contain any reference to the independent-review doctrine, even in the court's boilerplate recitation of the standard of appellate review for discretionary decisions. Instead, the court noted that an appellate court uses an "erroneous exercise of discretion" standard when reviewing evidentiary rulings, *Hunt*, slip op. at 3, Pet-Ap. 103, and quoted language from *Sullivan* summarizing the elements of discretionary decision-making, *id.* at 4; Pet-Ap. 104. But instead of continuing with an explanation of an appellate court's independent-review obligation when a circuit court does not offer an explanation for a discretionary decision, the court simply ended its summary of the appellate standard of review.

Second, at the end of the truncated statement of the standard of review, the court of appeals wrote:

> In fairness, the record demonstrates that the circuit court also indicated that it considered the other acts evidence admissible to establish the "context" of Hunt's charged crimes. Although "context" can be a reason to admit other acts evidence, *see, e.g., State v. Chambers,* 173 Wis. 2d 237, 255, 496 N.W.2d 191 (Ct. App. 1992), the circuit court did not explain how this evidence would establish that "context."

Hunt, slip op. at 5 n.4, Pet-Ap. 105 n.4. The court of appeals did not go on and determine whether the circuit court correctly admitted the other-acts evidence under the "context" rationale, a determination that an independent review of the record would have yielded.

Third, in finding fault with the circuit court's reliance on the "greater latitude" rule, the court of appeals wrote that "the [other-acts] evidence was probably not admissible under the greater latitude rule because the other acts were not sufficiently similar to the crimes charged." *Hunt*, slip op. at 5-6, Pet-Ap. 105-06. The court then added:

> Our use of the phrase "probably not admissible" points up the central problem here — although some of the other-acts evidence may have been admissible under various rationales, the circuit court failed to undertake the careful item-by-item analysis required by *Sullivan* for admission of other-acts evidence. *See Sullivan*, 216 Wis. 2d at 774 (without careful analysis of the criteria for admitting other-acts evidence, likelihood of error at trial is substantially increased).

Id. at 6 n.5, Pet-Ap. 106 n.5. The phrase "probably not admissible" shows that the court of appeals did not conduct an independent review of the circuit court's decision to admit the other-acts evidence: independent review would have resolved the admissibility issue, not left it in the limbo of "probably."

Fourth, when concluding that the circuit court erroneously exercised its discretion by admitting the other-acts evidence, the court of appeals wrote:

> The record demonstrates that the circuit court erroneously exercised discretion in admitting the other-acts evidence and that, by allowing the evidence, it magnified the risk that the jurors punished Hunt "for being a bad person regardless of his or her guilt" of the crimes charged. *See Sullivan*, 216 Wis. 2d at 783. . . . *Although the circuit court could have mitigated the unfairly prejudicial effect of the evidence by giving a cautionary instruction to the jury about the purposes for which the evidence was admitted and the proper use of that evidence in their deliberations, it gave no such instruction. See id.* at 791 (cautionary instruction can ameliorate adverse effect of other-acts evidence).

Id. at 6, Pet-Ap. 106 (emphasis added). Even a cursory independent review would have avoided the court of appeals' error here: the circuit court *twice* gave the jury

the precise cautionary instruction the court of appeals said the jury had not received (77:18-20; Pet-Ap. 141-43). Moreover, the court of appeals' error here seems particularly puzzling in light of the State's brief, which specifically pointed the court to the jury instruction that included the admonitions not to use the other-acts evidence for propensity purposes. State's CA Brief at 10 n.5, 12 n.7.[6]

E. An independent review of the record would have shown that the circuit court properly admitted "other acts" evidence under Wis. Stat. (Rule) § 904.04(2).

In its opinion, the court of appeals identified the admission of two "other acts" as violating the restrictions in section 904.04(2): "prior acts of claimed abuse of [Ruthie] by Hunt," *Hunt*, slip op. at 3, Pet-Ap. 103, and acts relating to "Hunt's alleged drug use," *id.* An independent review, however, would have shown that the circuit court properly admitted this other-acts evidence.

In *State v. Speer*, 176 Wis. 2d 1101, 501 N.W.2d 429 (1993), this court wrote:

> [O]ther crimes evidence is admissible "when offered for some purpose other than to prove the general criminal disposition of the accused." . . . Once an appropriate objection has been made to the admission of other crimes evidence, the burden is on the proponent of the evidence, in this case the State, to show that the other crimes evidence is relevant to one or more named admissible purposes. . . . If relevancy for an admissible purpose is established, the evidence will be admitted unless the opponent of the evidence can show that the probative value of the other crimes evidence is substantially outweighed by the danger of undue prejudice.

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[6] One of the State's references occurred in a footnote quoted in part in a footnote in the court of appeals' opinion. *Hunt*, slip op. at 5 n.3, Pet-Ap. 105 n.3 (quoting from State's CA Brief at 10 n.5).

Id. at 1113-14 (citations omitted). Section 904.04(2) "mandates the exclusion of other crimes evidence in only one instance: when it is offered to prove the propensity of the defendant to commit similar crimes." *Id.* at 1115. "The [rule's] specified exceptions to the exclusion are merely illustrative and not exclusive," *State v. Kaster*, 148 Wis. 2d 789, 797, 436 N.W.2d 891 (Ct. App. 1989), or exhaustive, *Sullivan*, 216 Wis. 2d at 783.

In addition, Wis. Stat. (Rule) § 904.03, dealing with the exclusion of relevant evidence, "mandates that other crimes evidence will be admitted unless the *opponent of the evidence* can show that the probative value of the evidence is *substantially* outweighed by unfair prejudice." *Speer*, 176 Wis. 2d at 1115 (first emphasis added; second emphasis in original).

Consequently, under *Sullivan*, a party seeking to use other-acts evidence must offer the evidence for a permissible purpose under Wis. Stat. (Rule) § 904.04(2), *Sullivan*, 216 Wis. 2d at 772, 783, and establish its relevance, *id.* at 773, 785. Once the proponent has done so, the opponent bears the burden on the third part of the *Sullivan* test and must "show that the probative value of the evidence is *substantially* outweighed by unfair prejudice." *Speer*, 176 Wis. 2d at 1115 (emphasis in original).

Here, the court of appeals did not dispute that the prosecutor offered the other-acts evidence for permissible purposes or that the prosecutor established the relevance of the evidence. Indeed, the court of appeals' decision did not turn on any error or failing on the part of the State in terms of the bases for offering the evidence, of the explanations in support of the offer, or of the sufficiency of the prosecutor's explanation of the relevance of the evidence. Rather, the court based its decision on an alleged failing by the circuit court in its analysis supporting the decision to grant the State's motion.

The record shows that the prosecutor offered the evidence for several permissible purposes: to show absence of mistake or accident; to show the context of the crime and to provide a complete explanation of the case;[7] to show the victim's state of mind;[8] to corroborate information provided to law enforcement officers and thus allow jurors to assess the credibility of testimony and other evidence.[9]

In particular, the prosecutor noted the need to use the evidence to provide the jury with a full context in which to evaluate the case. The prosecutor had good reason to offer the evidence for this permissible purpose. This evidence provided critical context about the case, as well as corroboration of testimony and circumstances the jury might otherwise have found bizarre beyond belief. Thus, by filling in gaps and painting a more complete picture for the jury, the evidence allowed the jury to make valid assessments of the truth or falsity of witnesses' testimony. Nonobjectionable testimony by Hunt's legal wife, Ruthie Hunt (73:22-105, 154-97), and Hunt's self-declared "wife," Angelica Johnson (74:5-98), provided a glimpse into the extraordinarily dysfunctional — even bizarrely

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[7] *Pharr*, 115 Wis. 2d at 348-49; *State v. Hereford*, 195 Wis. 2d 1054, 1069, 537 N.W.2d 62 (Ct. App. 1995); *State v. Clemons*, 164 Wis. 2d 506, 514, 476 N.W.2d 283 (Ct. App. 1991); *Shillcutt*, 116 Wis. 2d at 236; *cf.* Jason M. Brauser, *Intrinsic or Extrinsic?: The Confusing Distinction Between Inextricably Intertwined Evidence and Other Crimes Evidence Under Rule 404(b)*, 88 Nw. U. L. Rev. 1582, 1604 (1994) (under Fed. R. Evid. 404(b), "[c]ourts usually allow testimony concerning other crimes to fill in the gaps that would result if the testimony were excluded"). *See also* Daniel D. Blinka, *Wisconsin Evidence* § 404.7 (2d ed. 2001) (examples of enumerated and unenumerated purposes).

[8] *State v. C.V.C.*, 153 Wis. 2d 145, 450 N.W.2d 463 (Ct. App. 1989).

[9] *Kluck*, 223 Wis. at 389; *State v. Schaller*, 199 Wis. 2d 23, 43, 544 N.W.2d 247 (Ct. App. 1995).

dysfunctional — dynamic within the Hunt collective. The prosecutor offered the other-acts evidence for the perfectly acceptable purpose of allowing the jury to understand the breadth and depth of this dysfunction, to understand the relationship between the dysfunction and the wholesale recantations by the members of the Hunt confederation, to make valid determinations of witness credibility at various points in the proceeding, and, ultimately, to make an informed decision about Hunt's guilt or innocence — in short, to allow the jury to see the full picture in order to decide the truth or falsity of the allegations against Hunt.[10]

An independent review would have shown that on this basis alone, the other-acts evidence merited admission.

On the third step of the *Sullivan* test, Hunt did not bear his burden under *Speer*: he did not "show that the probative value of the [other-acts] evidence [was] *substantially* outweighed by unfair prejudice." *Speer*, 176 Wis. 2d at 1115 (emphasis in original).

In his brief in opposition to the prosecutor's motion, Hunt argued that *Alsteen*, 108 Wis. 2d 723, "sheds light on the dangers [of] unfair prejudice" (22:4). *Alsteen*, however, does not deal with prejudice in the context of the *Sullivan* test. Rather, *Alsteen* deals with prejudice in the context of a constitutional analysis of harmless error.

In *Alsteen*, this court concluded that the other-acts evidence did not satisfy the second step of the current *Sullivan* test: the other-acts evidence "was not relevant to any issue in the case." *Alsteen*, 108 Wis. 2d at 730; *see also id.* at 731 n.6 ("we find that such evidence should have been excluded on grounds of relevancy within sec. 904.02"). The court also held that the evidence did not have any probative value on an issue in the case. *Id.* at

[10] The court instructed on other-acts evidence to ensure the jury used the evidence for proper purposes only (77:18-20; Pet-Ap. 141-43).

730, 731. Because the evidence did not have *any* probative value, this court did not determine whether unfair prejudice substantially outweighed probativeness. Instead, this court discussed prejudice in the context of its harmless-error analysis of the impact of the circuit court's evidentiary ruling. *Id.* at 731-32.

Consequently, Hunt did *not* deal with the third step of *Sullivan* as an issue of weighing unfair prejudice against probativeness. Rather, he dealt with this issue in terms of constitutional harmless error. In doing so, he failed to carry his burden on this issue.

Even though *Speer* did not require the prosecutor to bear the burden on *Sullivan*'s third step, she nonetheless explained why the other-acts evidence satisfied this part of the test. She told the circuit court that the State needed the evidence "to explain what was going on in this household" (71:33; Pet-Ap. 124). Without that understanding, the recantations would not have any context, and the prosecutor could not offer the jury a sensible explanation for them. The evidence of other instances of reported sexual and physical abuse would help the jury understand the relationships within the Hunt group. The evidence would therefore greatly help the jury understand why the witnesses revealed the group's secrets to police on the night of September 21, 1999, but recanted once they returned to the residence and again isolated themselves from the outside world.

Under these circumstances, probativeness far outweighed prejudice. Indeed, Hunt's recitation of the other-acts evidence in his court of appeals brief (reprinted at Pet-Ap. 144-46) nicely captures the pattern of abuse that characterized the social dynamic in the household. This pattern offered the jury valuable insight into why people subjected to that kind of regime would recant after re-entering it from the outside world. The other-acts evidence both explained the cult-like atmosphere that prevailed in the Hunt collective and brought a sense of coherence and meaning to the rest of the evidence in the

case. Thus, this other-acts evidence served the most desirable and permissible purpose possible: to cast a light that illuminates the truth so the jury can see it clearly. Using other-acts evidence this way does not offend any restriction designed to prevent improper use of those acts.

In short, the circuit court properly exercised its discretion when it allowed the prosecutor to use other-acts evidence.

II. WHEN THE COURT OF APPEALS FAILED TO CONDUCT AN INDEPENDENT REVIEW THAT WOULD HAVE SHOWN THE RECORD SUPPORTED THE CIRCUIT COURT'S ADMISSION OF OTHER-ACTS EVIDENCE ON AS MANY AS SIX PERMISSIBLE GROUNDS, THE COURT OF APPEALS ERRED WHEN IT REVERSED HUNT'S CONVICTIONS BECAUSE OF THE CIRCUIT COURT'S ADDITIONAL REFERENCE TO AN IMPERMISSIBLE BASIS FOR ADMITTING THE EVIDENCE.

Despite the circuit court's specific agreement before trial that the State's other-acts evidence satisfied five permissible criteria for admission (context, opportunity, intent, absence of mistake or accident, and motive) (71:37-38; Pet-Ap. 128-29), despite the circuit court's explanation of its reasons for admitting the evidence for those purposes (71:38-40; Pet-Ap. 129-31), despite the circuit court's conclusion at the end of the trial that the other-acts evidence also satisfied a sixth permissible criterion for admission (preparation or plan) (76:256; Pet-Ap. 135), and despite the circuit court's instructions to the jury to use the evidence for the specified permissible purposes and not to use it for a specified impermissible purpose (77:18-20; Pet-Ap. 141-43), the court of appeals reversed Hunt's convictions based on two justifications the court of appeals found unacceptable. Neither of the justifications, however, merited reversal.

At the conclusion of the pretrial hearing on the prosecutor's motion in limine to admit the other-acts evidence, and after agreeing with the prosecutor that because the evidence satisfied five permissible criteria for admission, the circuit court carelessly stated that the evidence could permissibly show Hunt's propensity. The court's entire discussion and analysis of this notion consisted of the following: "[The other-acts evidence] *also* goes to whether or not contextually in this case here to show whether or not he acted in conformity therewith under the— you know, under the rules of the other acts evidence" (71:38; Pet-Ap. 129 (emphasis added)).

In the court of appeals, the State conceded that to the extent this comment suggested other-acts evidence can permissibly show conformity with a character trait, the court erred. *See, e.g.*, *Gray*, 225 Wis. 2d at 49. The State, noting that "[t]he prosecutor certainly never offered the evidence for that purpose, and [that] the court's jury instructions did not identify this purpose as permissible (77:18-20)," reminded the appellate court that "so long as the [circuit] court properly admitted the evidence despite an erroneous rationale, this court can still affirm the decision or order." State's CA Brief at 10 n.5 (citing *Holt*, 128 Wis. 2d at 124-25).

During the same pretrial hearing, the circuit court also said that the "greater latitude rule" permitted admission of the evidence (71:39-41; Pet-Ap. 130-32). The prosecutor did not invoke the greater-latitude rule, either in her written motions (16; 33; Pet-Ap. 114-17a) or in her oral presentation during the pretrial hearing (71:27-41; Pet-Ap. 118-32). Hunt's lawyer questioned the application of the greater-latitude rule (71:39; Pet-Ap. 130), but did not specifically object to the court's rationale.

For five reasons, the court of appeals fundamentally erred when it reversed Hunt's convictions because of the circuit court's comments. First, the court of appeals' reliance on these remarks rests on the court's view that the

circuit court did not conduct an adequate *Sullivan* review and that these bases — propensity and greater latitude — provided the only reasons for admitting the other-acts evidence. In the State's view (pp. 20-21, above), the circuit court conducted a sufficient review that resulted in admission of the evidence based on several permissible purposes.

Second, even assuming the circuit court did not conduct an adequate *Sullivan* review, the court of appeals had an obligation to conduct its own independent review and to look for reasons to sustain the circuit court's decision, not to turn away from those reasons and look for reasons to reverse. "Where the trial court has applied a mistaken view of the law, [an appellate court] will not reverse if the facts and their application to the proper legal analysis support the trial court's conclusion." *State v. Hereford*, 195 Wis. 2d 1054, 1069, 537 N.W.2d 62 (Ct. App. 1995). Moreover, "[e]vidence of other acts need only be relevant to one of the purposes enumerated in § 904.04(2) before it is admissible." *State v. Murphy*, 188 Wis. 2d 508, 518, 524 N.W.2d 924 (Ct. App. 1994). In addition, once a permissible basis exists for the admission of other-acts evidence, neither a circuit court nor the court of appeals has any reason to consider whether another basis also exists. *Cf. State v. Fishnick*, 127 Wis. 2d 247, 262, 378 N.W.2d 272 (1985) ("Because [a victim's] testimony was properly admitted for motive purposes and because its probative value was not outweighed by prejudicial effect, it is not necessary to our holding in this case to determine whether the [victim's] testimony was also admissible for identity purposes."); *State v. Bustamante*, 201 Wis. 2d 562, 574 n.8, 549 N.W.2d 746 (Ct. App. 1996) (same, citing *Fishnick*). An independent review by the court of appeals would have resulted in a decision conforming with these precedents, not repudiating them

Third, the court of appeals compounded its legal error with a flagrant error of fact: the court wrote that the circuit court did not give a cautionary instruction warning the

jury not to consider the other-acts evidence for propensity purposes. *Hunt*, slip op. at 6 ("it gave no such instruction"), Pet-Ap. 106. The record unequivocally refutes that assertion (77:19-20; Pet-Ap. 142-43). This error seriously infected the court of appeals' decision because the court asserted that "the circuit court's failure to give such an instruction further solidifies our conclusion that admission of the [other-acts] evidence was erroneous and unfairly prejudiced Hunt's defense." *Hunt*, slip op. at 6, Pet-Ap. 106. In light of the court of appeals' failure to conduct an independent review and the court's clearly erroneous belief that the circuit court did not give a cautionary instruction when, in fact, the court gave the warning twice, the court of appeals' conclusion that the circuit court erroneously and prejudicially admitted the other-acts evidence stands bereft of any legitimate support.

Fourth, as for the supposed "greater latitude" violation, an independent review would have shown justification for invoking that rule, despite the apparently different nature of the other acts.[11] *Cf.* Daniel D. Blinka, *Wisconsin Practice: Wisconsin Evidence* § 404.7, at 168 (2d ed. 2001) ("[m]otive, knowledge and intent are often inextricably intertwined and may involve other acts which are very different in character from the charged offense"). As the prosecutor declared from the outset, the other acts bore on several areas, including the victims' states of mind (16:4; Pet-Ap. 117). The other-acts evidence illuminated those states of mind for the jury as it assessed the credibility of the witnesses and decided how to evaluate the true meaning of the recantations.

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[11] Because the State did not advance a "greater latitude" rationale for the admission of the evidence, the court of appeals should have refrained from considering the circuit court's invocation of it. *Cf. State v. Fishnick*, 127 Wis. 2d 247, 256, 378 N.W.2d 272 (1985) (court did not review greater-latitude standard when State did not rely on it for admission of other-acts evidence).

The court of appeals' peremptory dismissal of the greater-latitude rule in this case reflects a fundamental misunderstanding of the rule. The rule's application does not depend on the similarity between the "other acts" and the charged conduct. Rather, the rule concerns "the difficulty sexually abused children experience in testifying, and the difficulty prosecutors have in obtaining admissible evidence in such cases[.]" *Davidson*, 236 Wis. 2d 537, ¶ 42. While a similarity or lack of similarity between the charged acts and the other acts bears on the assessment of the probative value of other-acts evidence in some cases, *Sullivan*, 216 Wis. 2d at 786-87, a lack of similarity does not preclude application of the greater-latitude rule. Rather, the rule requires that a circuit court permit greater latitude in applying all three prongs of the *Sullivan* test, including the assessment of relevance.

Fifth, the difference in the court of appeals' treatment of the bases it found improper and the court's treatment of the bases advanced by the State and found permissible by the circuit court creates an unacceptable anomaly. The transcript of the hearing on the other-acts evidence shows that the circuit court spent considerably more time addressing and analyzing the permissible bases for admitting the evidence than it spent on the two bases on which the court of appeals predicated its reversal. Aside from emphasizing the court of appeals' failure to make even a cursory independent review of the record, this contrast yields a curious principle in light of the court of appeals' reversal here: even when the jury never hears the circuit court state or imply an impermissible reason as a basis for admitting other-acts evidence and the jury in fact receives instructions precluding the use of the evidence for that impermissible reason, the unanalyzed but impermissible reason for admitting other-acts evidence still must trump even multiple analyzed and permissible reasons for admitting the evidence. In effect, the court of appeals' procedure here allows an offhand or careless remark by the circuit court about just *one* of its reasons for making a discretionary decision — a reason not heard by, known to, or considered by the jury — to operate as an

inevitably fatal poison that so contaminates the entire proceeding as to relieve the appellate court of its obligation to conduct an independent review in order to find reasons to save, if at all possible, the circuit court's decision from that court's own carelessness. The State does not know of any principle of appellate review advanced by this court or the Wisconsin Court of Appeals that sanctions a procedure yielding that outcome.

In short, the court of appeals erred when it reversed Hunt's convictions solely on the basis of the circuit court's treatment of propensity and the greater-latitude rule.

III. BECAUSE HUNT'S CONVICTION FOR FIRST-DEGREE SEXUAL ASSAULT RESULTING IN THE PREGNANCY OF A MINOR RESTED ON DNA EVIDENCE AND DID NOT HAVE ANY CONNECTION WITH THE OTHER-ACTS EVIDENCE, THE COURT OF APPEALS' OTHER-ACTS RULING COULD NOT DISPOSE OF ANY ISSUES RELATING TO THIS COUNT AND THEREFORE COULD NOT PROVIDE A REASON FOR REVERSING IT.

When the court of appeals reversed Hunt's convictions without conducting an independent review of the record, the court in effect invoked a *per se* rule of reversal even for counts proved by unrebutted scientific evidence unaffected by other-acts evidence.

At trial, the State introduced DNA evidence to prove that Hunt fathered Isaiah, the son of Tiffany, a fifteen-year-old girl at the time of Isaiah's birth. The State offered this evidence to prove Hunt's guilt of first-degree sexual assault resulting in the pregnancy of a child. The DNA test established the likelihood of Hunt's paternity as 99.989 percent (73:239; *see also* 73:241, 250-51). Although Hunt denied all allegations of sexual contact

with Tiffany (76:207, 231-33), he did not present any scientific or expert evidence to rebut the results of the DNA test.

An independent review of the record would have showed that the other-acts evidence did not play any role in the jury's verdict on that count. The DNA test provided the jury with all the evidence related to that count. In closing argument, the prosecutor confined her remarks on this count to reminding the jury that it had undisputed evidence about Tiffany's age, about the fact of Isaiah's birth, and about the results of the DNA test (77:44; *see also* 77:79). Hunt's lawyer merely argued (in four brief sentences) that the DNA evidence did not prove paternity (77:77).

On appeal, Hunt did not argue that the other-acts evidence had any effect on the count regarding Tiffany's pregnancy. Rather, he argued only that the circuit court erred by "refus[ing] to allow Hunt to argue that a family member could have been the father of Isaiah despite evidence which established opportunity and a genetic basis" for the other family member's paternity. Hunt's CA Brief at 72. Neither the State's evidence supporting conviction on this count nor the evidence on which Hunt sought to base his defense to this count had any connection with the other-acts evidence the State offered to support conviction on other counts.

By reversing even this count because of the other-acts errors, the court of appeals created a novel principle of appellate review: that a single erroneous other-acts rationale demolishes verdicts on counts clearly unaffected by other-acts evidence and as to which even the defendant never claims contamination by the circuit court's allegedly erroneous admission of other-acts evidence.

The court of appeals' reliance on *Gross v. Hoffman*, 227 Wis. 296, 277 N.W. 663 (1938), did not support the court's refusal to review the child-pregnancy count despite the court's decision to reverse the other counts. The court

summarized *Gross* as standing for the proposition that when a decision on one point disposes of an appeal, an appellate court will not decide other issues raised. *Hunt*, slip op. at 2 n.2, Pet-Ap. 102 n.2. *Gross*, however, does not sweep nearly so broadly. The *Gross* court wrote: "As one sufficient ground *for support of the judgment* has been declared, there is no need to discuss the others urged." *Gross*, 227 Wis. at 300 (emphasis added). *See also Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (citing *Gross*). Although an appellate court can refuse to address other issues when a decision *reversing* a judgment rests on a dispositive ground, *see, e.g.*, *State v. Schultz*, 224 Wis. 2d 499, 506, 591 N.W.2d 904 (Ct. App. 1999) (citing *Sweet*), the authority to do so depends on truly disposing of the entire matter for the stated reason.

Here, the court of appeals' decision on the other-acts issue could not dispose of the issue with respect the count charging Hunt with impregnating Tiffany. The record does not disclose any link between the other-acts evidence and the verdict on that count; the evidence supporting that count consisted entirely of admissible DNA evidence; and neither of the parties argued, in either the circuit court or the court of appeals, that the other-acts evidence in any way tainted the verdict on that count.

Consequently, the court of appeals could not properly reverse that count based on its decision on an issue unrelated to that count. To adapt this court's admonition in *Sullivan*, 216 Wis. 2d at 774, this aspect of the *Hunt* decision demonstrates with crystal clarity that without careful independent review of the record by an appellate court, the likelihood of erroneous reversals of criminal convictions substantially increases.

Regardless of what the court decides on other issues in this case, the court should overturn the court of appeals' decision on this count and reinstate Hunt's conviction for the sexual assault that led to the impregnation of Tiffany.

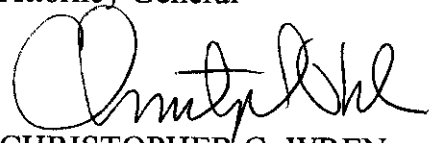
CONCLUSION

For the reasons offered in this brief, this court should reverse the decision of the court of appeals and reinstate Hunt's convictions. This court should conduct its own independent review of the record and hold that the circuit court properly admitted the other-acts evidence. In any event, this court should overturn the reversal of the count predicated on DNA rather than other-acts evidence and reinstate that conviction.

Date: December 26, 2002.

Respectfully submitted,

JAMES E. DOYLE
Attorney General



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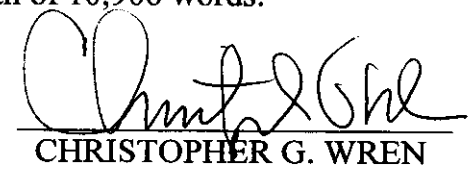
CERTIFICATION

In accord with Wis. Stat. § (Rule) 809.19(8), I certify that this brief satisfies the form and length requirements for a brief and appendix prepared using a proportional serif font: minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per line, and a length of 10,906 words.



CHRISTOPHER G. WREN

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 01-0272-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

JOHN P. HUNT,

Defendant-Appellant.

ON PETITION FOR REVIEW OF A DECISION OF THE WISCONSIN COURT OF APPEALS

APPENDIX OF PLAINTIFF-RESPONDENT-PETITIONER

MILWAUKEE COUNTY
JUDGE DENNIS P. MORONEY

JAMES E. DOYLE
Attorney General

CHRISTOPHER G. WREN
Assistant Attorney General
State Bar No. 1013313

Attorneys for Plaintiff-Respondent-Petitioner

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APPENDIX

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DISTRICT I

July 17, 2002

To:

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901 N. 9th Street
Milwaukee, WI 53233

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Deputy District Attorney
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Milwaukee, WI 53233

You are hereby notified that the Court has entered the following opinion and order:

01-0272-CR State of Wisconsin v. John P. Hunt (L.C. #99 CF 4897)

Before Fine, Schudson and Curley, JJ.

A jury convicted John P. Hunt of two counts of first-degree sexual assault of a child, one count of repeated sexual assault of a child, one count of first-degree sexual assault – causing pregnancy, one count of exposing a child to harmful material, and one count of second-degree sexual assault by use of force. On the first five counts, the victim was the child of Hunt's girlfriend; on the sixth count, the victim was Hunt's girlfriend. Hunt received a total of 122 years in prison on four counts and probation on the two remaining counts. On appeal, he argues that the circuit court erred when it allowed the state to introduce evidence that Hunt had engaged in prior "bad acts," including illegal drug use and the physical and sexual abuse of his wife. Based upon our review of the briefs and record, we conclude at conference that this case is

appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (1999-2000).[1] Because we conclude that the circuit court erred in admitting the other-acts evidence and that the error was not harmless, we reverse the judgment of conviction and remand this matter to the circuit court for a new trial.[2]

The facts relevant to this decision are largely undisputed. Hunt lived with his wife, Ruth, another woman, Angelica J., and Angelica's daughter, Tiffany. Hunt and Ruth belonged to a church that encouraged male members of the congregation to have more than one wife. Hunt's living arrangement with Ruth and Angelica J. apparently reflected this belief. In July 1998, when Tiffany was fifteen years old, she gave birth to a child. The State filed a criminal complaint against Hunt that alleged numerous sexual assaults of Tiffany. The State alleged that Hunt was the father of Tiffany's baby. The State also charged Hunt with second-degree sexual assault of Angelica.

Ultimately, neither Tiffany nor her mother cooperated with the State in its prosecution of Hunt, and both denied the allegations of the complaint. The State, in a pretrial motion, sought the circuit court's permission to introduce evidence at trial that Hunt had engaged in criminal acts that were not the subject of the complaint. *See* WIS. STAT. § 904.04(2) (1997-98) (evidence of other crimes, wrongs, or acts not admissible to prove character of person to show that he acted in conformity therewith, but may be permitted for purposes such as proof of motive, opportunity,

---

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[2] Hunt raises numerous issues on appeal. We need not address the additional arguments because the circuit court's erroneous decision to allow the other-acts evidence was unfairly prejudicial to Hunt's defense and, as such, requires reversal of the conviction and a new trial. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (when decision on one point disposes of appeal, appellate court will not decide other issues raised).

intent, preparation, plan, knowledge, identity, or absence of mistake of accident). In support of its motions, the State argued that the prior acts of claimed abuse of Ruth by Hunt were "relevant and probative of the 'context' in which the sexual assaults occurred, and also part of the corpus of the crimes with which the defendant [has been] charged." The State also maintained that the evidence related "directly to the victim's state of mind." In regard to Hunt's alleged drug use, the State argued those allegations provided necessary background for understanding Hunt's behavior and also provided "an independent source of information about the credibility of [the victims'] various stories" that was "highly relevant" in light of the victims' "recantation."

Over defense objections, the circuit court granted the State's motion and admitted some of the "other acts" evidence requested by the State. It reasoned that the proffered evidence went "to whether or not contextually in this case ... [Hunt] acted in conformity therewith under ... rules of the other acts evidence." It further reasoned that the evidence was relevant and was not unfairly prejudicial to Hunt. The circuit court also held that, because the sexual assault of a child was alleged, caselaw permitted it "more latitude" in admitting other-acts evidence. ***State v. Davidson***, 2000 WI 91, ¶¶36-37, 236 Wis. 2d 537, 613 N.W.2d 606 (in cases involving sexual assault of a child, courts permit "greater latitude of proof as to other like occurrences"). In light of this ruling, the State introduced evidence at trial that Hunt had been reported to police for using drugs, that Ruth had sought restraining orders against Hunt on three prior occasions, that Hunt had verbally threatened Ruth and others, and that Hunt had physically abused Angelica and Ruth.

A circuit court's evidentiary rulings are reviewed for an erroneous exercise of discretion, and this court will not find an erroneous exercise of discretion if there is a reasonable basis for the circuit court's determination. ***State v. Chambers***, 173 Wis. 2d 237, 255, 496 N.W.2d 191

(Ct. App. 1992). "An appellate court will sustain an evidentiary ruling if it finds that the circuit court examined the relevant facts; applied a proper standard of law; and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach." ***State v. Sullivan***, 216 Wis. 2d 768, 780-81, 576 N.W.2d 30 (1998).

WISCONSIN STAT. § 904.04(2) "precludes proof that an accused committed some other act for purposes of showing that the accused had a corresponding character trait and acted in conformity with that trait. In other words, § (Rule) 904.04(2) forbids a chain of inferences running from act to character to conduct in conformity with the character." ***Sullivan***, 216 Wis. 2d at 782. The test to determine whether other acts or other crimes evidence may be introduced has a three-rule framework:

> 1. Is the other acts evidence offered for an acceptable purpose under Wis. Stat. § (Rule) 904.04(2)?
>
> 2. Is the other acts evidence relevant under Wis. Stat. § (Rule) 904.01?
>
> 3. Is the probative value of the evidence substantially outweighed by the danger of unfair prejudice, confusion, or delay under Wis. Stat. § (Rule) 904.03?

Davidson, 2000 WI 91 at ¶35.

We conclude that the circuit court failed to properly apply this framework in permitting the other-acts evidence against Hunt and thereby erroneously exercised discretion. First, the circuit court based its ruling in substantial part on two erroneous rationales. As noted, it first indicated that the other-acts evidence was admissible to demonstrate whether Hunt had, in the

crimes charged, acted in conformity with the character evidenced by his other alleged bad acts.[3] By the precise terms of WIS. STAT. § 904.04(2), this rationale cannot be the reason for admitting such evidence. The danger of unfair prejudice in admitting evidence for this reason is "that the jurors would be so influenced by the other acts evidence that they would be likely to convict the defendant because the other acts evidence showed him to be a bad man." ***Sullivan***, 216 Wis. 2d at 790.[4]

Second, the circuit court indicated that the other-acts evidence was admissible under the greater latitude rule, which permits a "'greater latitude of proof as to other like occurrences'" in sexual assault cases, "particularly cases that involve sexual assault of a child." ***Davidson***, 2000 WI 91 at ¶36 (citation omitted). Here, although most of the charges against Hunt involved the sexual assault of a minor, much of the other-acts evidence admitted by the circuit court was not of a sexual nature and little, if any, involved acts against a child. Thus, the evidence was

[3] In its response, the State concedes that to "the extent [the circuit court's] comment might suggest 'other acts' evidence can permissibly show conformity with a character trait, the court erred." The State suggests, however, that the circuit court "probably did not intend its inartful comment." The circuit court's stated rationale was, however, erroneous, and nothing in the record suggests that the circuit court did not use this rationale to support its ruling. Therefore, the circuit court erroneously exercised its discretion when it admitted the evidence for this reason.

[4] In fairness, the record demonstrates that the circuit court also indicated that it considered the other acts evidence admissible to establish the "context" of Hunt's charged crimes. Although "context" can be a reason to admit other acts evidence, *see, e.g.*, ***State v. Chambers***, 173 Wis. 2d 237, 255, 496 N.W.2d 191 (Ct. App. 1992), the circuit court did not explain how this evidence would establish that "context."

probably not admissible under the greater latitude rule because the other acts were not sufficiently similar to the crimes charged.[5] ***Id.*** at ¶¶36-37.

The record demonstrates that the circuit court erroneously exercised discretion in admitting the other-acts evidence and that, by allowing the evidence, it magnified the risk that the jurors punished Hunt "for being a bad person regardless of his or her guilt" of the crimes charged. *See* ***Sullivan***, 216 Wis. 2d at 783. We are satisfied that the prejudicial effect of the admitted evidence substantially and unfairly outweighed its probative value, primarily because the other-acts evidence involved behavior significantly different than that for which Hunt was being tried. Although the circuit court could have mitigated the unfairly prejudicial effect of the evidence by giving a cautionary instruction to the jury about the purposes for which the evidence was admitted and the proper use of that evidence in their deliberations, it gave no such instruction. *See* ***id.*** at 791 (cautionary instruction can ameliorate adverse effect of other-acts evidence). While it is doubtful that, given the nature of the other-acts evidence allowed, a cautionary instruction could have reduced the prejudice to Hunt to such a degree that the evidentiary ruling could have been upheld, the circuit court's failure to give such an instruction further solidifies our conclusion that admission of the evidence was erroneous and unfairly prejudiced Hunt's defense.

[5] Our use of the phrase "probably not admissible" points up the central problem here – although some of the other-acts evidence may have been admissible under various rationales, the circuit court failed to undertake the careful item-by-item analysis required by ***Sullivan*** for admission of other-acts evidence. *See* ***Sullivan***, 216 Wis. 2d at 774 (without careful analysis of the criteria for admitting other-acts evidence, likelihood of error at trial is substantially increased).

IT IS ORDERED that the judgment of conviction is summarily reversed pursuant to WIS. STAT. RULE 809.21 and this matter is remanded to the circuit court for further proceedings consistent with this opinion.

Cornelia G. Clark
Clerk of Court of Appeals

"I, Cornelia G. Clark, Clerk of the Court of Appeals of the State of Wisconsin, certify that I have compared the foregoing with the original order and/or judgment of the Court in the above entitled cause, and that it is a correct transcript thereof."

Clerk of the Court of Appeals, State of Wisconsin

7-17-02
Date

State vs John P. Hunt

Judgment of Conviction

Sentence to Wisconsin State Prisons

Date of Birth: 08-06-1949

Case No.: 99CF004897

The defendant was found guilty of the following crime(s):

Ct.	Description	Violation	Plea	Severity	Date(s) Committed	Trial To	Date(s) Convicted
1	1st Degree Sexual Assault of Child	948.02(1)	Not Guilty	Felony B	10-09-1994	Jury	06-23-2000
3	Repeated Sexual Assault of Same Child	948.025(1)	Not Guilty	Felony B	12-28-1993 Between 9-30-1997	Jury	06-23-2000
4	1st Deg.Sexual Assault/Great Bodily Harm	940.225(1)(a)	Not Guilty	Felony B	in or about 10-11-1997	Jury	06-23-2000
5	Expose Child to Harmful Material - Sale	948.11(2)(a)	Not Guilty	Felony E	12-08-1993 Between 09-21-99	Jury	06-23-2000

IT IS ADJUDGED that the defendant is guilty as convicted and sentenced as follows:

Ct.	Sent. Date	Sentence	Length	Concurrent with/Consecutive to/Comments	Agency
1	08-17-2000	State Prisons	40 YR	As to counts 1, 3, 4, and 5 consecutive to each other and consecutive to any other sentence. As to all counts defendant advised not to work or participate in activities or have contact with children under 16. Advised he must register as a sexual offender and is subject to sexual viiolent person petition.	DOC
1	08-17-2000	Restitution		Work up be completed within 90 days for counseling for Tiffany Johnson and be signed by the defendant and be paid from up to 25% of prison wages and as a conditon of parole, or court will determine restitution amount, wage assignment.	
1	08-17-2000	Costs		Be paid from up to 25% of prison wages and as a condition of parole or serve 60 days HOC consecutive until the amount is paid in full, and any unpaid amount will remain due and owing.	
3	08-17-2000	State Prisons	40 YR	As to counts 1, 3, 4, and 5 consecutive to each other and consecutive to any other sentence.	DOC
3	08-17-2000	Restitution		See count 1.	
3	08-17-2000	Costs		See count 1.	
4	08-17-2000	State Prisons	40 YR	As to counts 1, 3, 4, and 5 consecutive to each other and consecutive to any other sentence.	DOC
4	08-17-2000	Restitution		See count 1.	
4	08-17-2000	Costs		See count 1.	
5	08-17-2000	State Prisons	40 YR	As to counts 1, 3, 4, and 5 consecutive to each other and consecutive to any other sentence.	DOC
5	08-17-2000	Restitution		See count 1.	
5	08-17-2000	Costs		See count 1.	

State vs John P. Hunt

Judgment of Conviction

Sentence to Wisconsin State Prisons

Date of Birth: 08-06-1949

Case No.: 99CF004897

Conditions of Sentence or Probation

Obligations: (Total amounts only)

Fine	Court Costs	Attorney Fees	Restitution	Other	Mandatory Victim/Wit. Surcharge	5% Rest. Surcharge	DNA Anal Surcharge
	80.00		TBD	5.00	280.00		250.00

IT IS ADJUDGED that **330** days sentence credit are due pursuant to § 973.155 Wisconsin Statutes.

IT IS ORDERED that the Sheriff execute this sentence.

Dennis P. Moroney 20, Judge
Miriam S Falk, District Attorney
David K Ziemer, Defense Attorney

CIRCUIT COURT MILWAUKEE CO. SEAL WISCONSIN

BY THE COURT:

Court Official

8-18-00

Date

State vs John P. Hunt

Date of Birth: 08-06-1949

Judgmer of Conviction

Sentence Imposed & Stayed, Probation Ordered

Case No.: 99CF004897

The defendant was found guilty of the following crime(s):

Ct.	Description	Violation	Plea	Severity	Date(s) Committed	Trial To	Date(s) Convicted
2	1st Degree Sexual Assault of Child	948.02(1)	Not Guilty	Felony B	10-09-1994	Jury	06-23-2000
6	2nd Degree Sexual Assault/Use of Force	940.225(2)(a)	Not Guilty	Felony BC	01-01-1999 Between 09-21-99	Jury	06-23-2000

IT IS ADJUDGED that the defendant is guilty as convicted and sentenced as follows:

Ct.	Sent. Date	Sentence	Length	Concurrent with/Consecutive to/Comments	Agency
2	08-17-2000	Probation Ordered	20 YR	Consecutive. Conditions as to counts 2 and 6.	DOC
6	08-17-2000	Probation Ordered	10 YR	Concurrent to count 2, but consecuitve to prison sentences. Conditions the same as count 2.	DOC

	Sentence(s) Stayed		Concurrent with/Consecutive to/Comments	Sent. Credit
2	State prison	20 YR	Consecutive	0 days
6	State prison	10 YR	Consecutive	0 days

Conditions of Sentence or Probation

Obligations: (Total amounts only)

Fine	Court Costs	Attorney Fees	Restitution	Other	Mandatory Victim/Wit. Surcharge	5% Rest. Surcharge	DNA Anal Surcharge
	40.00		TBD	4.00	140.00		

Miscellaneous Conditions

Ct.	Condition	Agency/Program	Comments
2	Restitution		See count 1.
2	Costs		From up to 25% of prison wages and any balance to be paid during parole or serve 30 days each count consecutive in the HOC until the amount is paid in full, and any unpaid amount will remain due adn owing.
2	Alcohol treatment		AODA treatment. Random urine screens; 1st dirty screen serve 20 days HOC, straight time, 2nd dirty screen serve 30 days HOC, straight time; 3rd dirty screen court recommends revocation of probation.
2	Psych treatment		Mental health evaluation.
2	Prohibitions		No drugs or alcohol. No contact with children under 16 years of age.

State vs John P. Hunt

Judgment of Conviction

Sentence Imposed & Stayed, Probation Ordered

Date of Birth: 08-06-1949

Case No.: 99CF004897

2	Other	Sexual deviant treatment and counseling. Anger management. Register as a violent person.
6	Restitution	
6	Costs	
6	Alcohol treatment	See count 2.
6	Psych treatment	See count 2.
6	Prohibitions	See count 2.
6	Other	See count 2.

IT IS ADJUDGED that 0 days sentence credit are due pursuant to § 973.155 Wisconsin Statutes.

IT IS ORDERED that the Sheriff execute this sentence.

Dennis P. Moroney-20 Judge
Miriam S Falk , District Attorney
David K Ziemer, Defense Attorney

CIRCUIT COURT MILWAUKEE CO. WISCONSIN SEAL

BY THE COURT:

Court Official

8-18-00

Date

State vs John P. Hunt

Date of Birth: 08-06-1949

Judgment of Conviction

Sentence to Wisconsin State Prisons

Case No.: 99CF004897

The defendant was found guilty of the following crime(s):

CORRECTED COPY

Ct.	Description	Violation	Plea	Severity	Date(s) Committed	Trial To	Date(s) Convicted
1	1st Degree Sexual Assault of Child	948.02(1)	Not Guilty	Felony B	10-09-1994	Jury	06-23-2000
3	Repeated Sexual Assault of Same Child	948.025(1)	Not Guilty	Felony B	12-28-1993 Between 9-30-1997	Jury	06-23-2000
4	1st Deg.Sexual Assault/Great Bodily Harm	940.225(1)(a)	Not Guilty	Felony B	in or about 10-11-1997	Jury	06-23-2000
5	Expose Child to Harmful Material - Sale	948.11(2)(a)	Not Guilty	Felony E	12-08-1993 Between 09-21-99	Jury	06-23-2000

IT IS ADJUDGED that the defendant is guilty as convicted and sentenced as follows:

Ct.	Sent. Date	Sentence	Length	Concurrent with/Consecutive to/Comments	Agency
1	08-17-2000	State Prisons	40 YR	As to counts 1, 3, 4, consecutive to each other and consecutive to any other sentence. As to all counts defendant advised not to work or participate in activities or have contact with children under 16. Advised he must register as a sexual offender andis subject to sexual viiolent person petition.	DOC
1	08-17-2000	Restitution		Work up be completed within 90 days for counseling for Tiffany Johnson and be signed by the defendant and be paid from up to 25% of prison wages and as a conditon of parole, or court will determine restitution amount, wage assignment.	
1	08-17-2000	Costs		Be paid from up to 25% of prison wages and as a condition of parole or serve 60 days HOC consecutive until the amount is paid in full, and any unpaid amount will remain due and owing.	
3	08-17-2000	State Prisons	40 YR	As to counts 1, 3, 4, consecutive to each other and consecutive to any other sentence.	DOC
3	08-17-2000	Restitution		See count 1.	
3	08-17-2000	Costs		See count 1.	
4	08-17-2000	State Prisons	40 YR	As to counts 1, 3, 4, consecutive to each other and consecutive to any other sentence.	DOC
4	08-17-2000	Restitution		See count 1.	
4	08-17-2000	Costs		See count 1.	
5	08-17-2000	State Prisons	2 YR	*01-10-01 Consecutive to any other sentence. Count #5 should not be included in with counts 1, 3, and 4.	DOC
5	08-17-2000	Restitution		See count 1.	
5	08-17-2000	Costs		See count 1.	

State vs John P. Hunt

Date of Birth: 08-06-1949

Judgment of Conviction

Sentence to Wisconsin State Prisons

Case No.: 99CF004897

Conditions of Sentence or Probation

Obligations: (Total amounts only)

Fine	Court Costs	Attorney Fees	Restitution	Other	Mandatory Victim/Wit. Surcharge	5% Rest. Surcharge	DNA Ana. Surcharge
	80.00		TBD	5.00	280.00		250.00

IT IS ADJUDGED that 330 days sentence credit are due pursuant to § 973.155 Wisconsin Statutes.

IT IS ORDERED that the Sheriff execute this sentence.

Dennis P. Moroney-20, Judge
Miriam Falk, District Attorney
David Ziemer, Defense Attorney

CIRCUIT COURT MILWAUKEE COUNTY WISCONSIN SEAL

BY THE COURT:

Julie Swetalla

Court Official

1-25-01

Date

BRANCH 20

STATE OF WISCONSIN | CIRCUIT COURT | MILWAUKEE COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

Case # 99CF004897

John P. Hunt,

Defendant.

FILED
CRIMINAL DIVISION
20 FEB 28 2000 20
JOHN BARRETT
Clerk of Circuit Court

STATE'S MOTIONS IN LIMINE

PLEASE TAKE NOTICE that the State of Wisconsin, by Assistant District Attorney Miriam S. Falk, will move the court, the Hon. Dennis Moroney presiding, for Orders consistent with the following requests. These motions will be made prior to the commencement of the trial in this matter, and the State requests that these issues be decided prior thereto as well.

1. That all witnesses be excluded from the courtroom during the course of his trial, and be admonished not to discuss their testimony with each other until the conclusion of the trial. Wis. Stat. Sec. 906.15.

2. That, prior to any witness taking the stand, a determination be made as to whether he/she has any criminal convictions, and, further, the admissibility of those convictions for purposes of impeachment. Wis. Stat. Sec. 906.09.

3. That, prior to the commencement of the body of the trial, the State be provided with the names and dates of birth of any witnesses the defense intends to call, so that a criminal record check can be run prior to that individual taking the witness stand. Wis. Stat. Sec. 971.23(2m)(b).

4. That prior to any defense witness taking the stand, the State be provided with any recorded statement of that witness in the possession of the defendant. Wis. Stat. Sec. 971.23(2m)(am).

5. That the State be permitted, when the victim and/or the child witnesses take the witness stand, the following:

   a. have a support person at or near the witness stand;
   b. to the extent it becomes necessary, assist the victim/witness by the use of leading questions, particularly with respect to the labels for body parts and issues relating to time. Wis. Stat. Sec. 906.11(3) and 906.11(1). The State makes this request for the sake of the record, which may otherwise be devoid of any words making such reference. The State may also utilize drawings, demonstrations and dolls in the communication process. State v. Peterson, 222 Wis. 2d 449 (1998); State v. Knighton, 212 Wis. 2d 883 (Ct. App. 1997).
   c. Counsel be permitted to approach the witness only after obtaining express permission of the court.
   d. The Assistant District Attorney be allowed to establish that the witness

understands the need to be truthful by use of "problem questions" asked of the victim/witness.

e. Counsel be directed to sue language and concepts which are developmentally appropriate to the child's levels during questioning.

The underlying purpose for all of the above requests is to provide an atmosphere in which the child(ren) may testify. The State wishes to maintain the "availability" of the child as a witness in the legal issue.

In addition, the court bears a responsibility to make the courtroom experience as positive and non-threatening as possible, under both Wisconsin Statute and the Constitutional Amendment relating to victim's rights. It has been consistently recognized in caselaw and statute that the trial setting can create additional trauma for those already victimized. It is this effect which is sought to be avoided.

6. That the State be permitted to introduce, via an expert, testimony relating to child sexual abuse. Specifically, the State intends to introduce information about disclosure patterns in child sexual abuse cases, along with information about why children tend to delay disclosure of abuse. The expert would explain what it is about being a child that influences whether and when a child discloses sexual abuse. The expert would also explain the psychosocial dynamics and pressures which impact upon a child who has been sexually abused, and which influence the disclosure process. The expert would also be asked to explain the "disclosure process", identifying what makes it a "process" as opposed to an incident.

The State would also via the expert, explain the special dynamics involved when the sexual abuse is incestuous in nature, including explanations of the impact of the stepfather/stepdaughter relationship on disclosure of the sexual abuse, and the impact of family dynamics upon the original disclosure, and the subsequent feelings and behaviors of the victim, including the phenomenon of recantation when there is no family emotional support for the victim who has reported.

The State also seeks to introduce how developmental issues relate to certain concepts, like memory and time. The jury in this case will be called upon to assess the credibility of this victim. Issues of developmental limitations, and their ramifications are relevant and necessary considerations which the jury must take into account if it is going to make a fully informed decision about the testimony. The specialized knowledge of the witness, and her ability to explain these matters, which are outside the common knowledge of the jurors, will assist them in understanding the evidence in this case. Wis. Stat. Sec. 907.02.

This case involves a delayed report by the victim, which is not an uncommon phenomenon in child sexual abuse cases. This is most likely to be outside the common knowledge of jurors, who might be under the common misperception that children would naturally report a sexual assault immediately. The "thinking" of a child, including why children do not report sexual assaults immediately is important information which the jury must have in order to assess the overall credibility of the evidence they will hear. State v. Jensen, 147 Wis. 2d 240, 432, N.W.2d 913 (1988); State v. Bednarz, 179 Wis. 2d 460, 507 N.W.2d 168 (Ct. App. 1993); State v. Huntington, 217 Wis. 2d 671 (1998).

In addition, the State anticipates that the victim in this case will recant her prior statements that she had been sexually abused by her stepfather. The evidence will show

that the victim has received no support from her family, and has experienced hardships at their hands due to her reports relating to her stepfather's conduct. The victim's mother observed the child being sexually molested by John P. Hunt, but did nothing to prevent it. The victim's family members have repeatedly come to court on behalf of the defendant, including asking for the return of the defendant to the family home. It is the State's position that these facts, along with others, will have substantially contributed to the recantation. The State seeks to have expert testimony to explain how these types of family pressures on a child victim can influence a recantation. State v. Bednarz, Supra.

7. That the parties be precluded, prior to a hearing on admissibility, from introducing information that the victim in this case was otherwise sexually active and/or sexually abuse by other individuals. This information is prohibited under the Rape Shield Law, sec. 972.11, Stats., absent a showing otherwise.

granted 8. That the defendant be prohibited from introducing testimony to the effect that the witness does not believe that the defendant committed the crimes alleged, or does not think that the defendant has the "character" to commit such a crime. This sort of testimony is in admissible "character" evidence, and is prohibited. State v. Tabor, 191 Wis. 2d 482 (Ct. App. 1995). Further, it is tantamount to the witness giving an opinion that the defendant is telling the truth, which is also prohibited. State v. Haseltine, 120 Wis. 2d 92 (Ct. App. 1984).

granted 9. That the parties be precluded from introducing evidence to suggest that the witness does not have a prior criminal record. This is also prohibited. State v. Bedkar, 149 Wis. 2d 257, 440 N.W.2d 802 (Ct. App. 1989).

10. That the State be permitted to introduce "other acts" of the defendant with which he is not currently charged. Specifically, the State desires to introduce the following:

    1. That the defendant's wife, Ruthie Hunt, has been the victim of both physical and sexual abuse at the hands of her husband. This includes the time period involved in the sexual abuse to the child victim Tiffany Johnson.

    2. That Jennifer Marks, another stepdaughter of the defendant, was sexually abused by the defendant when she was approximately the same age as Tiffany Johnson. That sexual abuse was reported to the police in 1995. It consisted of the defendant asking Jennifer to hug and kiss him, telling her she could feel his erect penis. He would also kiss her on her neck and fondle her breasts on top of her clothing. This occurred during the time period that Jennifer lived in the same residence as Mr. Hunt, and stood in relationship to him as stepfather/stepdaughter.

    3. That the State be permitted to introduce that John P. Hunt molested his daughter Cleopatrick Marks at a time when she was approximately the same age as the victim here. The defendant was also in the position of stepfather/stepdaughter, and they were residing in the same residence. Her stepfather fondled her bare breasts and vagina, and also exposed his penis to her asking her if she would like to have sex with him. This was also reported to the police.

    4. The State would also like to introduce that the defendant was physically abusive to the victim, Tiffany Johnson, as well as to the victim Angelica Johnson. **All of**

the reports have either been submitted to the defense in this matter or are being provided along with this motion.

5. The State seeks introduction of these other acts of the defendant under Section 904.04(2). With regard to the prior acts of sexual contact with his stepdaughters, it the State's position that these acts are relevant and probative of the issues of the defendant's intent and motive. With respect to the issues relating to the physical abuse of the parties mentioned above, it is the State's position that these acts are relevant to the "context" in which the sexual assaults occurred, and also part of the corpus of the crimes with which the defendant is charged. They also relate directly to the victim's state of mind. State v. C. V. C., 153 Wis. 2d 145 450 N.W.2d 463 (Ct. App. 1989).

6. The State seeks to further expand the arguments related to the other acts orally. If the State has an opportunity prior to addressing these motions on the record to provide additional written argument and citation to the court the State will do so.

Dated at Milwaukee, Wisconsin, this 19th day of February 2000.

Respectfully submitted,

Miriam A. Falk

Miriam Falk
Assistant District Attorney
State Bar Number No. 01009765

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STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 99-CF-4897

JOHN P. HUNT,

Defendant.

STATE'S SUPPLEMENTAL MOTIONS IN LIMINE

PLEASE TAKE NOTICE THAT the State of Wisconsin, by Assistant District Attorney Miriam S. Falk, will move the court, the Hon. Dennis Moroney presiding, before trial in this matter, for orders consistent with the following requests:

1. That the State be permitted to introduce into evidence Hunt's drug use. The State asserts the following three bases for admission of this evidence: first, it is part of the corpus of the crimes charged, in that he was using drugs during or before the sexual abuse to Tiffany Johnson; second, his drug use relates directly to his state of mind, especially at the time the incidents were revealed—he had been threatening to kill them and had become increasingly paranoid as a result of a drug use. This fact provides necessary background for understanding and evaluating Hunt's behavior; finally, it is corroborated by the observations of the first responding police, and therefore tends to corroborate the information provided to the police by the parties at the time of the investigation. Since the victims are recanting, as well as other family witnesses, evidence which provides an independent source of information about the credibility of their various stories is highly relevant.
2. That the court instruct the parties as to how witnesses may be questioned about events which occurred while Hunt was an in-patient at the Winnebago Mental Health Institute.

Dated this 15th day of June, 2000.

Miriam S. Falk
Assistant District Attorney
Bar # 01009765

today, I don't know how long it is going to take to get the people impaneled, but it looks to me like tomorrow morning might be the time so he can plan his life with his new child and wife, but that is what is going to have to be done as a threshold as well. And we proceed accordingly. I think that is fair.

All right. Anything else?

MR. ZIEMER: Yeah. Moving on, I have no objection to motions 8 or 9.

THE COURT: Okay. So I will grant those. 10.

MR. ZIEMER: Ten I would oppose.

THE COURT: Okay. Let's look at that.

MR. ZIEMER: Essentially the allegations of-- purported allegations of Ruthie Hunt-- I don't think they are sufficiently reliable here to be admitted. I know Miss Falk herself has talked to Miss Hunt and found-- and found the allegations of sexual abuse to be not worthy of warranting charges in this case. And for good reason. I mean essentially she realizes that they are not-- they are patently unreliable as well.

Furthermore, it would strictly be, you know, I mean I have no idea when these incidents purportedly occurred. There is no evidence to support that they occurred other than her statements which have since been recanted. I think it would be inappropriate to other

acts evidence to permit that in just because I think it doesn't have a sufficient indicia of reliability to be admitted, frankly.

THE COURT: State-- is that your position, then?

MR. ZIEMER: Yes.

THE COURT: Thank you. State.

MS. FALK: Your Honor, with respect to Ruthie Hunt the State would be intending to introduce information that is consistent with what she had told the police officers when they investigate. She indicated to both Officer Newport, who is in court, and to Detective Vicky Hall, who also interviewed her that same night, that the reason that she and the other 11 people showed up at the police station that night is because Mr. Hunt had been physically abusive with her and had been particularly so since approximately March of 1998. Supposedly he hit her in the chest and police were called. That is verified by information indicating that a District Attorney's case was filed-- charges had been filed against Mr. Hunt in 1998. That case was dismissed when Miss Hunt failed to show for the prosecution. She indicated also there were some incidents of physical abuse during which times police were called, but she also indicated she did not follow

through with prosecution. I did find other verifications. There was a 1997 case that was filed again involving a battery to her, and she did not follow through with that. In 1994 she filed three separate requests for restraining orders. All of those-- they had the temporary restraining order issued but not the final one because she failed to appear, but in each of those, according to the sworn petition that she filed in each of those, it says there were verbal threats about going to kill her, pushing her around, and punching her and hitting her, all of which she swore to on these documents, not letting her leave the house, threatening he would mess her up so nobody would know her, busting her head and mouth open requiring 22 stitches to her mouth. There has been ongoing physical abuse to Ms. Hunt that she described.

This is relevant in this case for two reasons. First of all, she was one of a large number of people who showed up at the police station that opened the door to this investigation. Her information was confirmed by the statements that were made by Angelica and Tiffany relating to what was going on within that household. So they were all telling the same story, and they were all describing physical abuse to various parties including Miss Hunt by Mr. Hunt.

Ruthie Hunt described that the physical abuse had been going on for a long time. That is confirmed by the other documents that the State has been able to obtain with respect to her.

In addition, the police officers also observed the objects that had been described to them by Ruthie Hunt and Angelica Johnson and Tiffany Johnson that had been used against them by Mr. Hunt. And that included the baseball bat, the sledge hammer and the metal pole. In addition they had described that he had barricaded the house and would not let them leave, and the police officers observed the items that were right at the doorway that would have been used to barricade the door.

So the physical evidence in this case corroborates the information that had been provided by Ruthie Hunt. Why this is relevant-- it takes on a particular importance in light of the fact that everybody is recanting their stories now. And so part of the State's case relates to the fact that not only have the two named victims provided this information but also the adult who was involved in this case also provided the same information, and I think it is relevant for the jury to hear the way that this manner became disclosed, the things that all the people were

saying to the police at the time. And it provides a basis then for the police explaining why they went in the house in the first place, why they were looking for particular things in the first place.

Her information is an integral part to the overall investigation. She also described sexual abuse to herself, and it is true that I did not choose to issue criminal charges, but it is not because I did not believe that she was the victim of sexual abuse. It was because in my estimation the circumstances would be the most difficult for a jury to understand, and I will give the Court an example. What she described to me clearly demonstrated to me the product of many, many years of physical abuse to her. Mr. Hunt would come into the room, he would demand sexual intercourse. She would be watching TV. She would tell him no. And he would lay down behind her, pull her pants down and insert his penis into her vagina as she just continued watching TV telling him she didn't want to do that. I felt that at best was a third-degree sexual assault, which is very difficult to prove. I believe that that happened to her. I believe that that happened to her many times. But I feel that it is very difficult for a jury to understand third-degree sexual assaults, and that is why I did not issue those charges.

In addition, I already had made some decisions about what I would issue with regard to Tiffany and Angelica, which I felt were not only better cases but also were so substantial in terms of their penalties that to add an additional count relating to Ruthie would simply have been piling counts on that were unnecessary. I believe that this information is relevant, and I think that it is not so prejudicial to the defendant that it should not be introduced. It is part of the corpus of the crime. It is the reasoning behind why these people reported to the police, and they did not report because Tiffany was being sexually abused. They reported because they were all in dire fear of their lives because of the threats to physical harm and to killing them that had been going on by Mr. Hunt. And Ruthie Hunt and the information that she provided is part of that story and is part of the overall credibility of these people at the time that they were making this report to the police and their lack of credibility now. That is why the State feels that it is so relevant and its probative value is so great that it outweighs any potential.

I don't believe there is any potential here for unfair prejudice, which is what the State has to determine under State v. Sullivan. I think that it is

relevant and admissible to describe the circumstances under which this household-- what it is is a Shillcut type of analysis. It is the context in which these crimes were happening, and I think that it is highly probative, and because of that I mean there are ways that the Court can circumscribe me. The Court can, for one thing, can rule that there are only certain ways or certain things about this that I can go into. The Court can always give a cautionary instruction indicating that this is to be admitted only for the purposes of the context in which the police investigation occurred and is not to be used to make a determination that Mr. Hunt is a bad person or that he acted in conformity. It is necessary to explain what was going on in this household, why the finding of the baseball bat and why the exodus of these 12 people out of the house in the night hours of September 21 even occurred. All of those things are relevant to this case, and I believe that the Court should allow its admissibility.

THE COURT: What specific under 904.04(2), what specific, appropriate reasons do you believe the State would be using this for?

MS. FALK: Well other than the context which is not-- the Court knows that under 904.04(2) that is illustrative and not exhaustive, and I will again state

to the Court the State v. Shillcut, that proposition that is where it was very clearly set, and that is 116 Wis.2d-- I think it is 325. It is a 1983 case from the Court of Appeals.

In addition, I believe that this also goes to the defendant's state of mind, and it goes to both of the victims, both of the victims and the witnesses' state of mind as well. It also goes to the absence of mistake or accident on the part of the defense, and this relates to what I have been explaining to the Court about it is just unlikely that this number of people could provide this level of detail relating to the same story and it all just be a conjecture.

THE COURT: Well you are saying-- I mean it would almost have motive and opportunity as well being within the same household and within the same context of the behavior ostensibly with others in the household besides the named defendant.

MS. FALK: That is correct.

THE COURT: Okay. What else do you want to say, Mr. Ziemer?

MR. ZIEMER: A few things.

In the first place, I have not received at this point any of the reports of these prior instances when she has called the police. This is all news to

me. I was not provided any of this information.

Secondly, the incidents that are discussed by Miss Falk here are outside of the time period of the majority of the charges in this case.

Count 1 through 4, the most serious counts here, which carry a total punishment of 160 years, all occurred from 1994 to 1997. According to the statements that were made back in September to the officers, Mr. Hunt's irrational behavior, violent irrational behavior is something that began roughly around January 1, 1999 or somewhere in that period, after, or, and some going back into '98. But in either case, it is outside of the time frame of the vast majority of the bulk of the charges against Mr. Hunt. And it certainly has nothing to do with his state of mind as to those charges.

Perhaps the Court can sever Counts 5 and 6 from this, and the thing I would like to-- but another possibility is I think I agree to a certain extent with the State does have to establish some kind of context here. However, I think that can sufficiently be done simply by having Officer Newport testify as to why they went to the police station in the first place. And excluding, you know, references to batteries that occurred way back from calling the police and the sexual assault allegation by Miss Hunt.

THE COURT: I think she was pretty much coming from '93 forward. Wasn't that the-- I didn't hear anything back from '88 or '89. You were talking about-- the only ones you mentioned to me were the '93 forward time frame.

MS. FALK: Right. With respect to Ruthie Hunt, the earlier one that I am aware of that I have been able to verify through documentation began in 1994 with the petitions for the restraining orders.

THE COURT: And that certainly is contextually within the confines of the allegation period, Mr. Ziemer.

MR. ZIEMER: Okay, the batteries apparently are '97 and '98.

THE COURT: And she said she is starting with the injunctive actions in '94, which would be right within the entire period of time contextually of the alleged actions that he was involved with.

MR. ZIEMER: And those are still-- those aren't the sexual assaults. Those are battery; correct? I don't know. The State still hasn't provided me with any of this information. I am still in the dark as to what the other acts evidence is going to be. I mean it is difficult for me to argue against it because I don't know what it is.

THE COURT: You haven't shared this with him?

MS. FALK: Well, your Honor, I gave all of this information to Mr. Bartell when I filed this document.

MR. ZIEMER: Mr. Bartell gave me a lot of documents but none of those.

MS. FALK: I can make photocopies. He is certainly welcome to just look at these documents, but I provided these to Mr. Bartell.

THE COURT: All right. Well--

MR. ZIEMER: I have a huge file, but none of this is contained in it.

THE COURT: Well you make copies of it today and give it to him. I mean you are talking about matters which are public record anyway. You are talking about injunctive matters that were filed. You are talking about-- you are talking about cases that were filed but not followed through on for whatever reason and, you know, those types of things that, you know, still would lead to a certain issue concerning treatment of the individuals under the circumstances of the basis for the charge. Apparently there was repeated acts of threats, you know, which would be acted upon at times to give credibility to those threats, you know, which would show motive. Certainly he had opportunity, his intent,

and certainly absence of mistake or accident.

The Court would find that the threshold requirements of a 904.04 other acts evidence have been satisfied in this case. I think there is not much question about that just based upon what I have heard, and also what I have read in the case and also the certain amount of information that has been provided but then certainly-- certainly denied at various times, and it goes to the credibility of the people, I grant you, but it-- but it also goes to whether or not contextually in this case here to show whether or not he acted in conformity therewith under the-- you know, under the rules of the other acts evidence.

So therefore I think that there is relevancy under the three-prong test of Sullivan. There is no-- certainly the appropriate reasons under the 904.04. There certainly is a relevancy connected with this which would give certainly some corroborative effect to the initial statements, at least of the witnesses, and certainly then you have got to take a look and, yes, it is prejudicial to the extent that any evidence that could be received in the case against Mr. Hunt would be prejudicial. I mean that goes without saying. Anything contrary or anything against him is prejudicial, but whether or not the relevancy under the appropriateness

of the other acts evidence, particularly in a sexual assault case which historically is more of a one-on-one situation, the rule is that, and especially in view of the issues affecting Ruthie Hunt and may very well be involved though the same things enter into as far as Tiffany is concerned.

MS. FALK: Yes.

THE COURT: Well, and they are even more so that the Court is supposed to allow more leniency and more latitude when it involves particularly sexual assaults of children, and that is what we have in this case at least at the time. And certainly with the prior inconsistent statements being the basis of the substantive proof in this case, the Court does feel that it is appropriate and I will allow 10-1 in, Number 2, 10-2.

MR. ZIEMER: Actually, your Honor, I think although there is more latitude with sexual abuse of children, I think that what is generally meant there is that you can bring in other instances of child sexual.

THE COURT: Not every act here of child sexual abuse was charged in this case, obviously.

MR. ZIEMER: Well what exactly as far as is it motive or to show motive or to show mistake of?

THE COURT: Just based on what I am hearing

you are talking about a contextural framework because I am not exhaustive as to these reasons. If there is other appropriateness, especially in view of the prior inconsistent statements being the substantive basis for the charge, context takes more-- actually it may very well be moved to the fore in this case because of that issue under Shillcut. But certainly there is a motive involved here as to what is involved with the ongoing nature of the alleged allegations. Certainly there is an opportunity for doing these things. They are in the same household under the circumstances involved. His intent was to gain access by whatever means he felt was appropriate, and certainly to say well that is crazy but the ongoing nature of the allegations which certainly go to absence of mistake or accident.

So for those four reasons the Court feels that the other acts evidence that were specifically identified plus the contextual aspect will be allowed in in this case. And it is particularly true not only as to Ruthie Hunt, even though she was an uncharged victim in this case, alleged victim, but it is particularly true when it comes to Tiffany, because she was a minor, which gives the Court even further latitude under the circumstances and requirements of law, which allows for the Court to have greater latitude when allowing in

other acts evidence, especially when there is alleged actions of child molestation involved.

I am doing that.

MR. ZIEMER: Okay. I will turn to Number 2 and 3 then, your Honor.

I would oppose those. We are willing to enter a stipulation pursuant to Wallerman and DeKayser that if he had-- whatever sexual contact he had was for the purpose of his sexual gratification, and I think that would prevent the State from introducing evidence of Jennifer and Cleopatrick Marks.

THE COURT: State?

MS. FALK: I completely disagree with that.

First of all, the issue here Mr. Hunt is denying that he had sexual contact, as far as I can tell, with his daughters. And so the fact that he had sexual contact with them is highly relevant, and I don't believe that he is stipulating to the fact that he had sexual contact with them, which of course is part of the issue here. And I would note and I will lay out my argument relating to the molestation of his two daughters, and there is some-- they are both his natural daughters.

I would note, first of all, that as to the victim, Tiffany Johnson, she was living in the residence

MS. FALK: Yeah, at this point I don't believe, unless she disappears.

THE COURT: Done. Well she is here and she is subpoenaed. She is going to stay here. She knows better.

THE COURT: So that brings us to 6-15.

MS. FALK: Yes.

THE COURT: 6-15. That is the one I need.

MS. FALK: The first one, your Honor, relates to Mr. Hunt's use of drugs.

THE COURT: Number 1 concerning the introduction of Mr. Hunt's drug use.

MR. ZIEMER: I would oppose the motion, your Honor, largely for the same reason that I opposed it as far as the allegations regarding Ruthie Hunt. The bulk of the allegations here involve the sexual acts with Tiffany that predate what is my understanding of when Mr. Hunt even supposedly began using drugs. As I recall the police reports, they state the drug use has been going on for about two years and the-- and the allegations involving Tiffany, which I said are the bulk, the vast majority of the charges in this case, predate that. I don't think-- I don't think-- I think it is extremely unfairly prejudicial. You know, I think-- I just don't think he can get a fair trial on

Counts 1 through 4 with the drug use, which is of absolutely no relevance to those charges whatsoever.

THE COURT: State?

MS. FALK: Well, your Honor, it is relevant to those counts and it is also relevant once again to how it is that these events become known to the police, and this was not revealed because of the sexual abuse. This was revealed because of the physical abuse and because of the threats to kill them that had been increasingly more and more and more pronounced. And that was, I believe, the direct result of his drug use, and that is clearly what the individuals had indicated to the police on the night that all 12 of these people showed up at the Police Department. In addition, it is corroborated by the observations of the police. The police officer, Officer Newport, will testify that he observed Mr. Hunt when he came to the door to be very, very nervous and agitated, sweating profusely. He could not stay on a train of thought, was making nonsensical comments all over the map which, according to Officer Newport's experience, is consistent with the behavior of a person who is using a controlled substance. And Officer Doyne, who was in the car with Mr. Hunt for an hour and a half while Officer Newport was interviewing the individuals, would indicate that that behavior not only continued but

that Officer Doyne in that close space was able to easily smell the illegal substance that was emanating from Mr. Hunt while he was there. And I believe that, too.

It is actually relatively common knowledge that using controlled substances alters people's state of mind, that sometimes people become very paranoid. I mean that is very consistent with what the parties are indicating, and I think it also provides a basis for understanding Mr. Hunt's behavior, Mr. Hunt's paranoia, Mr. Hunt's barricading the house. This jury has to make some decisions about some very peculiar behavior and some very amazing allegations in this case, and I think if they don't understand who Mr. Hunt is, including the fact that he was using drugs, they are not going to have the complete picture. That is not fair to them to make a good decision in this case. I believe that again under the Shillcut case but also under a State v. CVC type analysis, except that we are talking about the defendant's state of mind versus the victim's state of mind, it is extremely relevant and it is permissible under 904.04(2), and that relevance is so strong and so directly related to the issues in this case that it outweighs any potential for unfair prejudice.

And the fact that the police officer's own

observations confirm what was being reported to them by these now recanting individuals I think enhances its probative value.

MR. ZIEMER: Your Honor, I don't see how what relevance it has when, as I said, as I have seen the police reports, the drug use apparently started after the incident involving Tiffany-- after the Counts 1 through 4 took place. It is not probative whatsoever as to those charges.

MS. FALK: Well, Judge, I guess I would--

MR. ZIEMER: As far as the context goes, you know, I mean it is possible maybe having Officer Newport testify as to some limited drug use might be appropriate. I am not conceding that it is, but again, as was my position with Ruthie Hunt, I think it should be limited to that when she explains how the cops came here, why they came here in the first place. But it is not-- the drug use-- the allegations, from what I see, it came afterwards. It is unfairly prejudicial. It has no relevance whatsoever to Count 1 through 4, which are the bulk of the charges in this case. And it is not particularly relevant. I don't believe even if 5 and 6-- it is only marginally relevant to Count 5 and 6.

THE COURT: Anything further?

MS. FALK: Well, Judge, only to the extent

that the other acts relating to Ruthie also, and now I know Mr. Ziemer is saying he didn't get this, but there are references in these documents to drug use that Ruthie Hunt had made dating back to 19-- the 1977 case and the 1998 case. I guess I just think overall it is the context in which this family was living, and particularly the more recent use of drugs that was making him increasingly more paranoid, which is what they are going to discuss that is relevant to this case, that it relates to how this case came to the attention of the police. He was the person who was behaving in this manner as a result of his drug use, and it escalated to the point where they were so in fear of their life that they went to the Police Department. And this is what they were reporting. I don't see how that story can come out if we excise the part about the fact that he was using drugs resulting in this behavior.

THE COURT: Well there is clearly some nexus between the behavior alleged and based upon the statements of the witnesses and the observations of the police. Clearly also, you know, based upon the-- again the contextual nature of this case, you know, it would seem that, you know, you have the same problem here you had in all the other ones. Under Shillcut whether or not contextually it would be appropriate not to have it

as some kind of explanation as to why a person would act in the alleged way that was being suggested in that case. The witnesses have reported drug use. Now they are recanting everything. And yet there is personal observation by officers that would indicate that there was drug use involved which would have been the-- which would have been consistent with the observations made by the complaining witnesses under the circumstances, and which would give them substance on the investigative concepts. So therefore they are probably appropriate in this case. And again contextually because of the Shillcut case as well as the fact that it does go to show motive, intent, opportunity, not so much opportunity in this case. Motive and intent in this particular matter really would be the issues for why the drug issue would be important. It does not go to the next two areas of absence of mistake or accident or to the issue of opportunity, because that is not relevant as same regards the use of drugs that would have got his thought process going in a particular way which would have been-- obviously goes to motive and intent.

So as to those two reasons the Court would find that the drug useage is appropriate under the other acts exception and that they are the-- two of the acts are within the recognized exceptions as well as the

contextual concepts that I have referred to, which are meaning that they are not exhaustive as to the other acts evidence in context in this case is important, especially in view of the recantations.

Court will allow that in for purposes of this matter under the circumstances of the evidence of the case and that certainly they are relevant under the three prong test of Sullivan. And that yes, again, they are prejudicial but every bit of evidence is prejudicial against the defendant under the circumstances of the case, and if that would be the case there would be no contrary evidence gotten in about a defendant which would make the State's burden impossible despite the fact that we have a beyond a reasonable doubt burden.

So the Court will allow the jury to consider it under the circumstances of this case. All right.

MS. FALK: Your Honor, with respect to Number 2, I will just explain. When Mr. Hunt was at Winnebago Mental Health Institute for the competency evaluation, what is reported by Tiffany is that there was a third line that was put into the home at 2433 North 22nd Street, and that while she was there phone calls would come from Winnebago Mental Health Institute being placed by Mr. Hunt. She would be handed the phone by her mother or Ruthie. Mr. Hunt would get

did that also. And I'm going to do that also as to reading the one-fifteen which identifies the counts before the jury as well. I do -- I followed through on that consistency both into the non -- not guilty verdicts as well, just so there's a little bit of a differentiation so that they don't run together without getting into too specific of an explanation as to any one of the counts because that's their verdict and they may consider any of the issues or any of the things that I would put in there as extraneous or not helpful and I don't want to emphasize any fact to them but for the basic charge. Five-fifteen, unanimous verdict.

And the one I'm here to discuss with you is two-seventy-five, cautionary instruction on evidence of other crimes, wrongs, acts, that type of thing. I've given you something there but I just reviewed it real quickly after I had a chance here during the course of our matter.

I did have under the third, there were three specific things that basically I understood and found from the evidence had come out as far as other acts.

There had been evidence received that the defendant made threats of death or physical harm to

each of the Hunt/Johnson family as same resided at 2433 North 22nd Street, city and county of Milwaukee on September 21st, 1999. I didn't get into specifics. There was some evidence that it was only said to about Ruthie, but there was some evidence that it was made directly to the group as a whole. So I felt that to get into specifics would be inappropriate.

I also found that there was apparently some alleged other acts evidence that were coming in concerning Ruthie and/or Angelica that were made to the police and/or district attorney's office which were subsequently not processed due to the said alleged victim not following through with the prosecution on each of those matters.

Then the third thing I found, that there had been other acts alleged about sexual abuse of Jennifer Marks on the part of the defendant reported to the police and district attorney's office which was subsequently not prosecuted due to the said alleged victim not following through with the prosecution or the prosecution was not pursued by the State.

MR. ZIEMER: Judge, you should put Cleopatrick in that same paragraph.

THE COURT: I had that in there.

MS. FALK: And then you crossed it off.

THE COURT: I had it in my rough, I thought. Okay. I'll put and/or Cleopatrick Marks. And I brought it concerning the issues of motive, opportunity, intent, preparation or plan or absence of mistake or accident. Did not have issues of knowledge, did not have issues of identity, did not go into the contextual concepts because I didn't think it was necessary. I mean we're not talking about context here, we're just talking about events or incidents that allegedly occurred. It had nothing to do with the only concepts involved in this case necessarily except that these alleged instances have been previously reported to police.

Any objection or any words that you would like to add or subtract or anything else you'd like to tell me about the two-seventy-five as presented with the addition of the third and/or Cleopatrick Marks?

State?

MS. FALK: Well, Judge, there was also information about the defendant's use of drugs. Now, I offered -- Courts vary on whether they consider that to be evidence of other acts. It

certainly was reported, they've heard a lot of evidence about it. It was also something that was confirmed by the police officer's observations.

To me, his use -- his drug use on that night was part of the body of the crime and it really isn't an other act, but to the extent that the other acts that he had been using drugs for a while and that his drug use had escalated to the point where he was paranoid and had been keeping them upstairs, that to me is part of the context of this case. And it also has to do with the defendant's state of mind.

MR. ZIEMER: I think it's probably best just to not mention it.

MS. FALK: That's fine with me. I just raise it because we did have a motion on it, and so that's one point.

The other point is with respect to the issue of context, I understand what the Court is saying. It is the State's intention, however, to argue that the whole family dynamic in this case provides a context against which they need to measure these particular acts. So even if the Court does not include language about context which was part of the basis for the Court -- it was certainly

part of the State's argument why this should be admitted and I thought it was part of the Court's reasoning.

THE COURT: Well, it is, except that, you know, now you're takin' -- I mean, you do have that right to have context in, and I did include that in my reasoning of why I allowed it in because there is a global concept here. I'm not against including the word "context" under Shulcott, and I understand that. I guess as the evidence came in, in Shulcott, even though I understand you had some leeway in terms of how it came in and I felt it was appropriate under the circumstances how it came in, I think, you know, and I think you can argue context in the whole big picture of this dysfunctional family, okay, and I'm not saying you can't. I guess to go ahead and then try to define context for them without just letting you argue context because that's really what you're talking about here, you're talkin' about an on-going pattern of lifestyle within the family.

MS. FALK: Right.

THE COURT: But I think for me to get precise with them as to what they want to consider contextually then limits them. I'm not gonna limit

you with respect to pulling it all together contextually in your argument, I think that's where it belongs as opposed to specifically trying to in the words of a cautionary instruction have me limit or try to define the context of this situation, I think it's almost indefinable, number one, and I think, you know, that was my thinking in not including it here. It wasn't that I didn't understand the reasoning, I still think the reasoning is right but I think to put it into verbiage in a contextual framework for purposes of an instruction I think it's better to be left to argument. That was my thought.

MS. FALK: That's fine with me. I would only, if the defendant wanted that word in I wouldn't object to it.

MR. ZIEMER: "Context"?

MS. FALK: Right.

MR. ZIEMER: I don't want it.

THE COURT: All right. The Court won't have it in.

Okay. As far as this cocaine, the cocaine situation is important to come in in this case only because it did go to the state of mind or alleged state of mind based upon the observations of the

family on the date and time in question which basically brought this to culmination on 9/21 of '99, his deteriorating situation.

Actually, we've heard several different timeframes being from 1/1 of '99, that being the time they moved over to their address on 22nd Street, and so I think that based upon the statements of the expert from the Children's Hospital and the family, they've indicated that drugs were a factor in this situation. Hearing the defendant's version is that he never did drugs and then he smelled it wasn't the house it was strictly from burning rags and grass, they've also heard that.

I think if I started putting it in here concerning cocaine as an exception -- or to -- I think it leads them to not be able to consider the factual issue of whether or not it was smoking grass and rags versus his cocaine that affected his overall function as the family indicated. But that's for the jury to issue from a factual context of this case not for me to direct them based on other acts or crimes. That's why I didn't include it.

Do you agree with that, Mr. Ziemer?

MR. ZIEMER: I have no objection to the Court's leaving it out.

THE COURT: All right. Well, I'm going to do that. And I'll leave it out for those reasons as I've indicated.

So except for the fact that we're going to add after "Jennifer Marks" we're going to add "and/or Cleopatrick Marks" in the third experience, you know, the third example of other -- and I used -- I described it as other incidents only because none of these ever resulted in a conviction, they all -- many of them had initially prosecution or police reports but for whatever reason they never really got to the conviction aspect and therefore I didn't want to raise them to the level of other crimes. I think other acts or other incidents involving the defendant for which he's not on trial for -- and I think that's the better way, you have several options up on top there.

Any aspect of that particular form of the verdict that you're objecting to, State?

MS. FALK: No.

MR. ZIEMER: That's fine.

THE COURT: All right.

All right. Then I'll do that on the

room with continuous contact with his counsel by headset. The defendant's decision not to be present in the courtroom during the trial must not be considered by you in any way, and must not influence your verdict in any manner.

Evidence has been received regarding other incidents involving the defendant for which the defendant is not on trial.

Specifically, evidence has been received that the Defendant made threats of death or physical harm to each of the Hunt/Johnson family as same resided at 2433 North 22nd Street, City and County of Milwaukee, Wisconsin, on September 21st, 1999.

Further, there have been other acts of reported physical abuse on the part of the Defendant regarding Ruthie Hunt and/or Angelica Johnson reported to the police and/or District Attorney's Office which were subsequently not prosecuted due to the said alleged victims not following through with the prosecution.

Further, there have been other acts of alleged sexual abuse of Jennifer Marks and/or Cleopatrick Marks on the part of the Defendant. The same were reported to the police and/or

District Attorney's Office which were subsequently not prosecuted due to the said alleged victims not following through with the prosecution, or the prosecution not being pursued by the State.

If you find that this conduct did occur, you should consider it only on the issues of motive, opportunity, intent, preparation or plan, or absence of mistake or accident.

You may not consider this evidence to conclude that the defendant has a certain character or a certain character trait and that the defendant acted in conformity with that trait or character with respect to the offenses charged in this case. The evidence was received on the issues of:

Motive; that is, whether the defendant has a reason to desire the result of the crime.

Opportunity; that is, whether the defendant had the opportunity to commit the offense charged.

Intent; that is, whether the defendant acted with the state of mind that is required for the offense.

Preparation or plan; that is, whether such other conduct of the defendant was part of a design or schedule that led to the commission of the offense charged.

Absence of mistake or accident; that is, whether the defendant acted within the state of mind required for this offense.

You may consider this evidence only for the purposes I have described, giving it the weight you determine it deserves. It is not to be used to conclude that the defendant is a bad person and for that reason is guilty of the offense or offenses charged.

An exhibit becomes evidence only when received by the Court. An exhibit marked for identification and not received is not evidence. An exhibit received is evidence whether or not it goes to the jury room.

Disregard entirely any question that the Court did not allow to be answered. Do not guess what the witness's answer to such question might have been. If the question implied certain facts were true, disregard any such implication and draw no inference from the question.

___ N.W.2d ___. An examination of all the cases invoking that rule, however, reveals that without exception, the other acts deemed admissible were prior sex acts, most involving children, having some parallel to the charged crimes. As defense counsel pointed out at trial, however, the greater latitude rule has no application when the other acts involved do not involve other acts of a sexual nature against a child. (R37-39).

The other acts introduced in this case were legion. Over the course of the entire trial and through numerous witnesses, the State introduced evidence alleging, *inter alia*, that in the past:

(1) Hunt had been reported to police for using drugs (R73-75);

(2) Ruth sought a restraining order against Hunt on three separate occasions, alleging on one occasion that Hunt told her he could have his friends kill her (R73-75-76);

(3) Ruth had alleged Hunt had pushed her around and hit her with a big knife (R73-77);

(4) Hunt threatened to mess Ruth up so much that nobody would recognize her (R73-78);

(5) Hunt had "busted [Ruth's] head" (R73-78);

(6) Hunt "busted [Ruth's] mouth open causing her to need 22 stitches back in the early 1970s when they were teenagers" (R73-78-79);

(7) Hunt had slapped and kicked Ruth and put a knife to her (R73-79-80);

(8) Hunt struck her in the face with an open hand causing a cut to the inside of Ruth's cheek (R73-86);

(9) Hunt threatened to kill Ruth with a gun and a gun was found in Hunt's bedroom (R73-87);

(10) Hunt hit Ruth in the chest with a closed fist (R73-88);

(11) Hunt had punched Angelica three or four times in her ribs, bruising her ribs, when she was pregnant. (R74-57-58);

(12) Hunt had done physical, bad, painful and harmful things to Ruth, Angelica and Tiffany in the past. (R74-37-38);

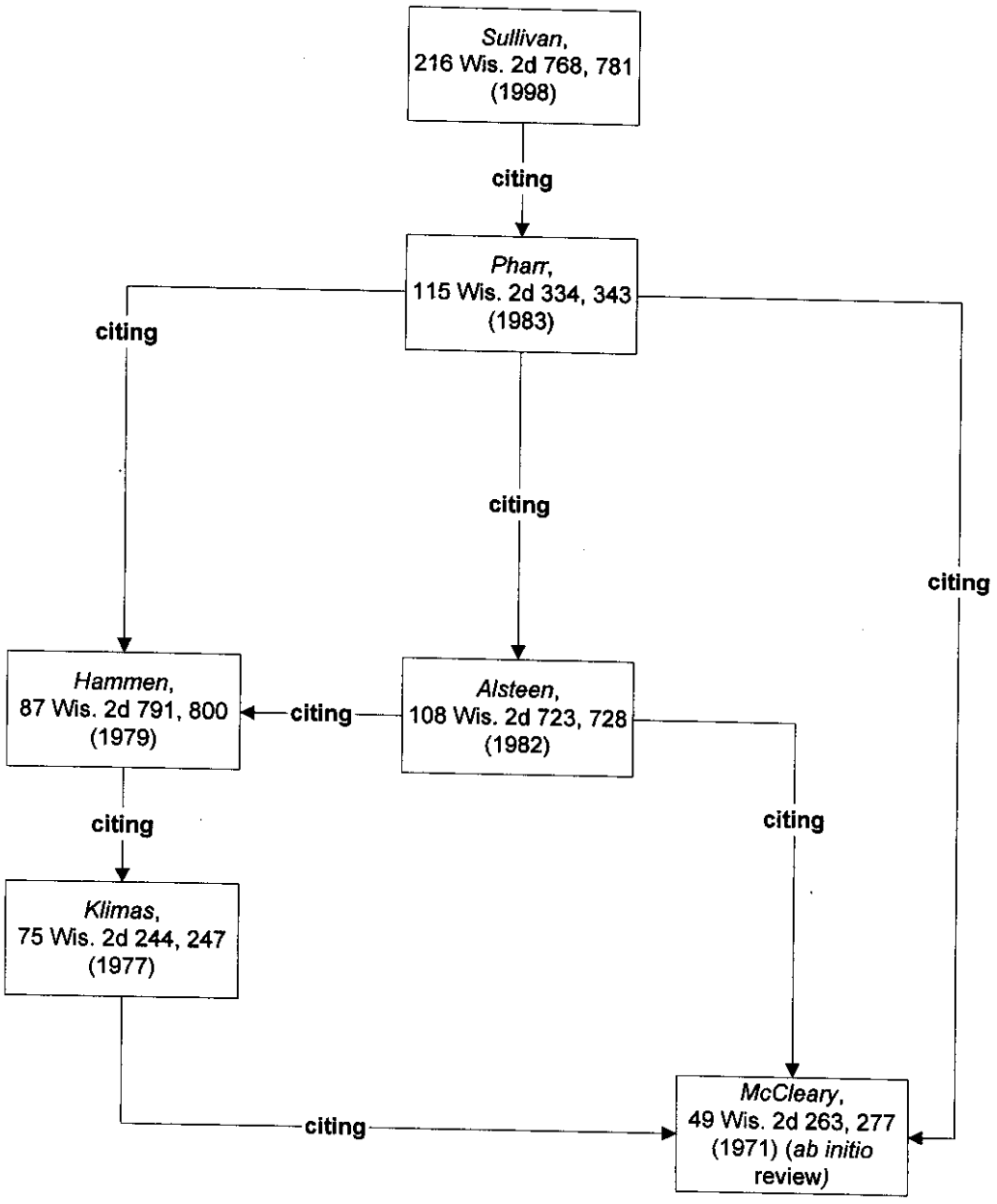
(13) Hunt stole money from Angelica's purse (R74-59);

(14) On another occasion, Hunt was arrested by police for physically abusing Angelica (R74-59);

(15) Hunt had been seen choking Ruth (R74-78).

In applying prong one of the *Sullivan* test to the present case, there was no permissible purpose for allowing the State to introduce allegations of prior domestic battery against Hunt, particularly given the inapplicability of the greater latitude rule. Contrary to the trial court's musings, whether Hunt had a history of violent behavior revealed nothing about whether he possessed the requisite motive or intent when he had sexual

Independent-review antecedents of *State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998)



STATE OF WISCONSIN
SUPREME COURT

Docket No. 01-0272-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

JOHN P. HUNT,

Defendant-Appellant,

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

CIRCUIT COURT OF MILWAUKEE COUNTY
The Honorable Dennis P. Moroney, Presiding
Trial Court Case No. 99-CF-4897

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Other Authorities :

ISSUES PRESENTED

I. WHETHER THE COURT OF APPEALS, HAVING CONCLUDED THE UNFAIR PREJUDICIAL EFFECT OF PRIOR ACTS EVIDENCE ADMITTED UNDER SECTION 904.04(2), STATS., SUBSTANTIALLY OUTWEIGHED ITS PROBATIVE VALUE, IN PART BECAUSE THE JURY NEVER RECEIVED A CAUTIONARY INSTRUCTION EXPLAINING THE OSTENSIBLE PURPOSE ADVANCED BY THE STATE FOR ITS ADMISSION, MUST NEVERTHELESS INDEPENDENTLY REVIEW THE ENTIRE RECORD IN SEARCH OF SOME ALTERNATE THEORY OF ADMISSIBILITY.

The court of appeals answered: No.

The trial court did not address this issue.

ISSUES PRESENTED (Cont.)

II. **WHETHER, AS A GENERAL RULE AND FOR PUBLIC POLICY REASONS, AN APPELLATE COURT SHOULD HAVE THE AUTHORITY TO REFUSE TO INDEPENDENTLY REVIEW A TRIAL COURT'S EXERCISE OF DISCRETION WHICH IS FUNDAMENTALLY FLAWED, PARTICULARLY WHEN THE RECORD IS SO VOLUMINOUS THAT DOING SO WOULD BE ONEROUSLY BURDENSOME ON THE APPELLATE COURT.**

The appellate court did not answer this question.

The trial court did not address this question.

III. **WHETHER THE RESULT IN THIS CASE WOULD HAVE STILL BEEN THE SAME EVEN HAD THE COURT OF APPEALS INDEPENDENTLY EXERCISED ITS DISCRETION IN THE MANNER PROMOTED BY THE STATE.**

The appellate court did not answer this question.

The trial court did not address this question.

ISSUES PRESENTED (Cont.)

IV. **WHETHER AN APPELLATE COURT, HAVING CONCLUDED A DEFENDANT'S RIGHT TO A FAIR TRIAL WAS SEVERELY COMPROMISED BY THE IMPROPER ADMISSION OF A WHOLE SLEW OF HIGHLY PREJUDICIAL PRIOR BAD ACTS, IS STILL REQUIRED TO EMPLOY A HARMLESS ERROR RATIONALE AND DIVINE UPON WHICH CHARGES THE JURY MAY HAVE CONVICTED THE DEFENDANT BECAUSE HE WAS A PERSON LIKELY TO DO SUCH ACTS AND ON WHICH CHARGES IT DID NOT.**

The appellate court did not answer this question.

The trial court did not address this question.

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

By accepting the Petition for Review filed by the State, this Court deemed the case sufficiently important to merit oral argument and publication.

STATEMENT OF THE CASE

On September 25, 1999, the State filed a Criminal Complaint charging the defendant-appellant, John Hunt with two counts of First Degree Sexual Assault of a Child, one count of Repeated Sexual Assault of the Same Child, one count of First Degree Sexual Assault - Causing Pregnancy, one count of Exposing a Child to Harmful Material and one count of Second Degree Sexual Assault By Use of Force. The Complaint alleged Tiffany Johnson was the victim of Counts One through Five and Angelica Johnson, Hunt's girlfriend and Tiffany's mother, was the victim of Count Six. (R2).

On October 8, 1999, Hunt appeared for a competency hearing and was ordered to undergo an in-patient examination at the Winnebago Correctional Center. (R57-3-4, 7-8). On October 28, 1999, Hunt was found competent to stand trial. (R58-5-6). Bail was set at $250,000. (R58-12). On November 4, November 29, and December 16, 1999, the court held a preliminary hearing and found probable cause to bind Hunt over for trial. (R60; R61-2, 4-5). On February 10, 1999, the court upheld the commissioner's finding of probable cause. (R61-20-21).

On February 28, 2000, the State filed motions in limine requesting, *inter alia*, the admission of other acts evidence. (R16). Specifically, the motion sought admission

of: (1) acts of prior sexual abuse of Hunt's wife, Ruth Hunt, his stepdaughter, Jennifer Marks, and his daughter, Cleopatrick Marks; and (2) acts of physical abuse of Ruth and another daughter, Tiffany Johnson, the alleged victim in this case.[1] (R16-3). In support of introducing acts of physical abuse, the motion asserted the acts were:

> Relevant to the "context" in which the sexual assaults occurred, and also part of the corpus of the crimes with which the defendant is charged.

(R16-4). On June 16, 2000, just three days before trial, the State filed a supplemental motion in limine seeking to also introduce evidence of Hunt's past drug use, again noting the evidence would be part of the corpus of the crimes charged, enhance the credibility of the witnesses, and relate to Hunt's state of mind. (R33).

Unfortunately, the motion was not heard until June 19, 2000, the morning of trial, at which time the court granted

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[1] It will greatly clarify the issues before this Court to point out, at this early juncture, that only the acts of physical abuse were pursued by the State at the motion hearing, (R71-28-34), ruled on by the court, (R71-38), and proven with extrinsic evidence. (R78-75-78; R74-37-78), and are before this Court on appeal.

it. (R71-59-61). Thereafter, the trial commenced and ran through June 23, 2000, at which time the jury returned guilty verdicts on all counts. (R77-105-107).

On August 17, 2000, the trial court sentenced Hunt as follows:

Count 1:	40-year prison term.
Count 2:	20-years probation, consecutive to the prison terms;
Count 3:	40-year prison term, consecutive;
Count 4:	40-year prison term, consecutive;
Count 5:	two-year prison term, consecutive;
Count 6:	10-years probation, concurrent to Count Two.

(App. B; R78-35-39).

On August 22, 2000, Hunt filed a Notice of Intent to Pursue Post-Conviction Relief. (R50). On January 26, 2001, Hunt filed Notice of Appeal. (R55). On July 17, 2002, the court of appeals deemed the case appropriate for

summary disposition, reversed the judgment of conviction and remanded for further proceedings. (App. A).

On August 16, 2002, the State filed a Petition for Review with this Court. By an order dated November 12, 2002, this Court granted the petition and ordered both parties to submit new briefs, or, in the alternative, to stand on the briefs submitted to the court of appeals. This brief is Hunt's submission pursuant to that order.

STATEMENT OF THE FACTS

In 1970, John Hunt met Ruth Marks. (R73-23). Soon thereafter, they began living together and over the course of the next decade, had three children: a son John Marks (1972), a daughter Cleopatrick Marks (1974), and another daughter Jennifer Marks (1979). (R73-24). In 1982, John and Ruth were married. (R73-24). Thereafter, in 1984, they had a daughter they named Ruthie Littleneal Hunt. (R73-25). In 1988, they had another daughter they named Cecillia Hunt. (R73-26-27).

After Cecilia was born, Hunt and Ruth continued living at 6125 West Custer Avenue with their five children. (R73-56). By that time, they were attending a church - Spirit of Israel Church and its Army - whose members adhered to rather unorthodox religious beliefs. For example, the church believed and encouraged its male members to have more than one wife. Consequently, when, in 1988, John and Ruth met another woman, Angelica Johnson, it was eventually agreed Angelica would move in with them and assume a role as Hunt's common law wife. (R74-8-10). Hunt, however, not wishing to violate the laws of the state, never married Angelica in a civil ceremony. (R73-29-30).

Thus, in May of 1988, Angelica Johnson, with the full consent of Ruth, moved in with three children from another relationship: Tiffany, Lana and April. (R74-8-10). Under

the new living arrangement, both Ruth and Angelica were, at varying times, intimate with Hunt and both were content with the arrangement. (R74-12). The women believed the arrangement was sanctioned by scriptures which teach that a marriage takes place in the heart, not on paper. (R74-12-16). Angelica considered herself Hunt's "wife" because of the supporting role she played in the household and his dedication to her. (R74-14-16). Both women also enjoyed the mutual support they received raising their children who, in turn, considered both women to be their mothers. (R73-38-39).

Over the next several years, the extended family moved numerous times. In March of 1993, they moved to West Ring Street. (R73-54-55). In September of 1993, they moved to 3984 North 37th Street where they lived until February of 1998, when they moved to 2415 West Fond du Lac Avenue. (R73-51-53). A few months later, they moved to 2433 North 22nd Street. (R73-47; R74-104).

During this same time frame, the family also increased in size. In 1993, John and Ruth had another son they named John Patrick Hunt II. (R73-26-28). Angelica also had three children with Hunt: Jermaine Johnson, John Hunt IV, and John Hunt V. (R73-35). Ruth and Angelica continued to get along very well, helping to care for each other's children and doing chores around the house. (R73-38-39). While the

living arrangement may have been unorthodox by societal standards, it was also perfectly legal.

In July of 1998, when Tiffany Johnson was just 15 years old, she gave birth to a child. (R73-41-42; R74-104). Testimony elicited at trial suggested Hunt took an unusually active role in the labor. For example, during the labor, while Angelica held her daughter Tiffany's hand, Hunt apparently walked around the bed quoting bible scriptures. (R73-45-46). Testimony from the attending nurse also suggested Hunt was distressed by the pain Tiffany was experiencing and challenged somewhat the treating physician's orders. (R73-45). In any event, the labor was particularly stressful because Tiffany had decided she did not want the baby, but wanted Ruth to assume responsibility for it. (R73-43). When Tiffany gave birth to a boy, Ruth named him Isaiah, a reference to a bible scripture. (R73-44).

The events which gave rise to the charges in this case began on September 21, 1999. On that date, everybody in the house decided to return some tapes to Blockbuster and go shopping at K-mart. (R73-57). Because Hunt was tired, he decided to stay home. (R73-62). Although there was no argument regarding Hunt's decision to stay home, (R76-203), his refusal to accompany them angered some members of the group, particularly Ruth. (R73-63).

Tiffany, too, was upset with Hunt, but for a different reason: he had greatly restricted her freedom following her pregnancy. Thus, in an effort to remove the authority figure from the house, she decided to make up a lie about Hunt. (R74-32-33). Consequently, while the group was out that evening, Tiffany told Ruth that Hunt had threatened to kill Ruth in her sleep. (R73-60). This accusation prompted the women to begin thinking about not returning home that evening. Ruth, who had grown tired of Hunt's proselytizing, also believed that when she returned home, Hunt was going to preach the bible at her. (R73-68-69). Thus, at around 10:00 or 11:00 at night, the women determined they would not return home and began making inquiries about staying in a shelter. (R73-58; 185-87). Hunt, meanwhile, began to worry about his family and had his brother-in-law drive him to look for the family members. (R76-204). Unfortunately, Hunt was unable to find them. (*Id.*).

The reason Hunt was unable to track down his family may have been because they were at the police station. When efforts to find a shelter were unsuccessful, the women decided to go to the police station on Fond du Lac Avenue to try to convince the police to remove Hunt from the house. (R73-58-59). They used, as a basis for going to the police station, the allegations Tiffany had made regarding Hunt's threats. (R74-36-37). Angelica testified that despite the threat, she thought the police would just escort them home and make sure they were safe. (R74-44-45). Others

hoped the police would simply remove Hunt from the house for the night.

The investigating officers, however, alleged that much more was said about Hunt that evening above and beyond the alleged threat to kill Ruth. Indeed, police officers claimed certain members of the entourage told police a fantastical story of drug use and physical and sexual abuse by Hunt against members of his family. For example, the police claim they were told Hunt was a chronic crack cocaine smoker, abusing the drug every night from about 7:00 p.m. to 6:00 a.m. (R73-92).[2] Police also claimed they were told Hunt inflicted injuries on the party members with a sledge-hammer, a jackhammer, a metal baseball bat and a metal microphone stand and just a few days earlier, had punched Tiffany in the nose. (R74-72; R75-39). Most explosively, the police claimed to have been told of Hunt forcibly engaging in sexual assaults of some of the women, including some of the children. (R75-34-39).

At trial, Ruth and the others flatly contradicted these claims. For example, Ruth testified she simply told police she was afraid of Hunt and wanted them to follow her home. (R73-70). In any event, it is undisputed the police

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[2] Ruth maintains she was simply asked if Hunt smoked, to which she replied, "yes." (R73-74-75).

did follow the group home, told Ruth and the children to stay in the van, arrested Hunt then searched the house. (R73-70-71).

At that point, at least some of the putative allegations against Hunt began to unravel. For example, despite searching thoroughly for evidence of crack cocaine, they found no evidence of any controlled substances, much less crack cocaine, or a single item of paraphernalia used to smoke or ingest crack or any other drug. (R76-87). Moreover, despite the awful physical abuse Hunt allegedly inflicted on family members, no injuries were observed on any of the women with the exception of a small bruise on Angelica's knee. (R76-80-84). Angelica, however, attributed that bruise to falling on the stairs and nothing in the detective's reports attributed the bruise to Hunt. (R76-82).[3] Particularly conspicuous by its absence was any evidence of injury to Tiffany's nose which supposedly had been bloodied and swollen from being on the receiving end of a blow from Hunt's fist just a couple days earlier. (R74-72-73; 76-87). Nor did police look for the clothes Tiffany was wearing during any alleged assault. (R76-83-85).

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[3] Nor were any medical records introduced at trial to document a single injury to any family member.

Nevertheless, Angelica did admit at trial she had told police Hunt had engaged in sexual contact with Tiffany. She steadfastly maintained, however, that she had been badgered into making this allegation by threats of removal of her children from her household. (R74-60-61). Indeed, Detective Hall admitted at trial that Angelica said nothing about Hunt having sex with Tiffany until after she was threatened with consequences for lying to police. (R76-77-79). Angelica, however, denied telling police Hunt had threatened her or anyone else. (R74-47).

The police did find, however, some of the objects they claimed to have been told were used to inflict the physical abuse. For example, police found a baseball bat, a sledge-hammer and a microphone stand during their search of the house. (R74-202-203). These items were not found, however, out in the open as suggested by pictures introduced by the State at trial, but instead, had been placed there (e.g., on the couch) by police for purposes of taking the pictures. (R74-204). It also came out at trial that these objects were inside the house because the house at North 22nd Street did not have a garage. (R74-221-22).

At trial, Hunt took the stand on his own behalf. (R76-202). He categorically denied ever having any sexual contact with Tiffany. (R76-207). He further denied ever having assaulted Angelica. (*Id.*). Finally, he testified he had never

seen the pornographic videotapes introduced into evidence at the trial. (R76-207-208).

ARGUMENT

I. THE COURT OF APPEALS' REVIEW OF THE RECORD WAS SUFFICIENT TO CONCLUDE THE PROBATIVE VALUE OF THE PRIOR ACTS WAS SUBSTANTIALLY OUTWEIGHED BY THEIR PREJUDICIAL EFFECT, AND HAVING MADE THAT DETERMINATION, IT WAS UNNECESSARY FOR THE APPELLATE COURT TO CONDUCT A MORE EXTENSIVE INDEPENDENT REVIEW OF THE TYPE ARGUED BY THE STATE.

A. Overview Of Prior Acts Law

Once again, this Court is called upon to shape the law surrounding the use of other acts evidence under section 904.04(2), Stats. Thus, even though the issues raised by the State largely address the appropriate standards of review in such a situation, and the appropriate relief to be granted by the appellate courts, it is still the best analytical point of departure:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as

> proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Section 904.04(2). It is further illuminating to recall the evolution of section 904.04(2) has historically been an area of concern for Wisconsin's courts.

The reasons for generally excluding other acts evidence were set forth in *State v. Whitty*, 34 Wis. 2d 278, 292, 149 N.W. 557 (1967):

> The overstrong tendency to believe the defendant guilty of the charge merely because he is a person likely to do such acts; (2) the tendency to condemn not because he is believed guilty of the present charge but because he has escaped punishment from other offenses; (3) the injustice of attacking one who is not prepared to demonstrate the attacking evidence is fabricated; and (4) the confusion of issues which might result from bringing in evidence of other crimes.

These reasons express the fear that an invitation to focus on an accused's character magnifies the risk jurors will punish the accused for being a bad person regardless of his guilt of the crime charged.

Although section 904.04(2), Stats., originally constituted a formidable exclusionary rule, in the decades following *Whitty*, the rule became a casualty of the war on crime. In 1994, the appellate court lamented the gradual erosion of *Whitty*'s principles:

> In the seminal "other acts" decision of *Whitty v. State*, our supreme court cautioned that other acts evidence should be used sparingly, only when reasonably necessary, and that such evidence normally carried a calculated risk. We have examined the multitude of "other acts" Wisconsin cases, published and unpublished, since *Whitty*. Except for an isolated few, these decisions have consistently approved the use of such evidence while mouthing *Whitty*'s principles. . . .This trend is lamented and criticized by our colleague's concurring opinion, and others have voiced similar concerns. Whether we agree with this trend or not, one thing is clear: *Whitty* is not the bastion it once was and it is time for the courts to say so. Unless or until our supreme court reverses the direction of law in this area, we should stop writing appellate opinions which pretend to honor *Whitty* but actually offend it.

State v. Johnson, 184 Wis. 2d 324, 341, 516 N.W.2d 463 (Ct. App. 1994)(citations omitted). This was not an isolated

observation. *See also State v. Tabor*, 191 Wis. 2d 482, 498-500, 529 N.W.2d 915 (Ct. App. 1995) (J. Nettesheim, partially concurring, partially dissenting); *State v. Rushing*, 197 Wis. 2d 631, 650-52, 541 N.W.2d 155 (Ct. App. 1995) (J. Myse, concurring).

In 1998, this Court responded to the repeated requests to reaffirm the vitality of section 904.04(2) and *Whitty*. *State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998). To correct the type of superficial analysis which was leading to prosecutorial requests to use "other acts" evidence being little more than a *fait accompli*, *Sullivan* began by reaffirming the three-step analytical framework at the core of determining admissibility of other acts evidence:

> (1) Is the other acts evidence offered for an acceptable purpose under section 904.04(2);
>
> (2) Is the other acts evidence relevant; and
>
> (3) Is the probative value of the other acts evidence substantially outweighed by the danger of unfair prejudice.

Sullivan, 216 Wis. 2d at 772-73.

Breathing new life into *Whitty*, this Court condemned the careless manner in which trial courts were rushing through the three-step analysis and re-emphasized the need to proceed with the greatest of caution. *Sullivan* directed prosecutor and trial court alike to "carefully" probe the permissible purposes for admission of other acts evidence, "carefully" articulate whether the evidence relates to a consequential fact or proposition in the criminal prosecution, "carefully" explore the probative value of the evidence and "carefully" balance it against unfair prejudice. The guidance this Court provided in *Sullivan* was calculated to avoid the overly broad use of "other acts" evidence.

Unfortunately, as this case demonstrates, *Sullivan*'s directives have not universally taken root. As will be discussed later, the trial court's analysis in this case was anything but careful. As will be noted now, *State v. Speer*, 176 Wis. 2d 1101, 501 N.W.2d 429 (1993), is still being cited for the proposition that section 904.04(2), Stats., mandates exclusion of other acts evidence only when it is offered to prove the propensity of the defendant to commit similar crimes. (State's Brief, p. 25). Such a proposition not only turns section 904.04(2) on its head by attempting to recast it as an inclusionary rule (with a solitary exemption) but also ignores some of this Court's reasoning in *Whitty* (holding other acts evidence should be excluded, even if not offered to prove propensity, if it causes "confusion of issues").

B. The Court Of Appeals' Determination That Introduction Of The Other Acts Evidence Was Unfairly Prejudicial To Hunt Effectively Ended Any Need For Further Independent Review.

The test *Sullivan* adopted for determining the admissibility of prior acts evidence is styled in the conjunctive. Accordingly, for other acts evidence to be admissible, all of the following must be true:

(1) the other acts must be offered for a permissible purpose;

(2) the other acts must be relevant; and

(3) the probative value of the other acts must substantially outweigh any unfair prejudice.

Sullivan, 216 Wis. 2d at 772-73. It follows that a failure on any of these three prongs effectively ends the inquiry.

How the appellate court viewed this case is evident from a footnote to its out-of-the-gate pronouncement that it was reversing the judgment of conviction and remanding for a new trial:

> We need not address the additional arguments because the circuit court's erroneous decision to allow the other-acts evidence **was unfairly prejudicial to Hunt's defense** and, as such, requires reversal of the conviction and a new trial. *See Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 633 (1938) (when decision on one point disposes of appeal, appellate court will not decide other issues raised).

(App. A-2) (emphasis added). While this remark was made with reference to other issues Hunt had raised on appeal, it was equally applicable to sub-issues the State believes the appellate court was obliged to review under the *Sullivan* paradigm.

The appellate court's decision reveals it was fully familiar with the factual underpinnings of this case, correctly noting the facts relevant to its decision were "largely undisputed." (App. A-2). Thereafter, it correctly rehearsed how the other acts issue evolved procedurally at trial and the impact of its resolution in favor of the State:

> In light of this ruling, the State introduced evidence at trial that Hunt had been reported to police for using drugs, that Ruth had sought restraining orders against Hunt on three prior occasions, that Hunt had verbally threatened Ruth

> and others, and that Hunt had physically abused Angelica and Ruth.

(App. A-3).[4]

Thereafter, the appellate court reviewed this Court's decision in *Sullivan*, the analytical framework set forth therein, and noted, *inter alia*, the trial court's belief that the prior bad acts would demonstrate Hunt had acted in conformity with the character evinced by those acts. (App. A-4-5). Observing such a rationale could not support its ruling, the appellate court stated:

> The danger of unfair prejudice in admitting evidence for this reason is that the jurors will be so influenced by the other acts evidence that they would be likely to convict the defendant because the other acts evidence showed him to be a bad man.

(App. A-5), *citing Sullivan*, 216 Wis. 2d at 790. (Quotations omitted). Thus, it is true the trial court's faulty reasoning had an impact, as it should have, on the appellate court's decision.

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[4] Virtually none of the prior acts involved Tiffany, who was the subject of five of the six counts Hunt was facing.

The State, however, believes the appellate court should have ignored the trial court's remarks as a mere slip of the tongue, and petitions this Court to do the same. However, just because the trial court's observation regarding the impact of the prior acts was not legally tenable to support its ruling does not mean the observation itself was wrong or insincere. Here, the trial court, best situated to gauge the impact of the evidence, reasoned it would show Hunt acted in conformity with the character evinced by those bad acts. There is no reason to conclude the court was wrong about this or to cavalierly discard its acknowledgment of the prior acts' prejudicial impact, even if the trial court did not intend, and the State does not like, the legal consequences of its reasoning. Indeed, the appellate court addressed this aspect of the decision:

> The State suggests, however, that the circuit court "probably did not intend its inartful comment." The circuit court's stated rationale was, however, erroneous, and **nothing in the record suggests that the circuit court did not use this rationale to support its ruling.**

(App. A-5, fn 3) (emphasis added). The court of appeals should not be required to simply ignore the trial court's considered observation that the prejudicial effect of the evidence was so pervasive it would demonstrate Hunt's

proclivity to commit crimes just because the trial court did not appreciate the legal effect of such an observation.

The court of appeals thus concluded the unfair prejudicial effect of the evidence substantially outweighed its probative value. To that end, it concluded its opinion by stating:

> The record demonstrates that the circuit court erroneously exercised its discretion in admitting the other-acts evidence and that, by allowing the evidence, it magnified the risk that the jurors punished Hunt "for being a bad person regardless of his or her guilt" of the crimes charged. *See* ***Sullivan***, 216 Wis. 2d at 783. We are satisfied that the prejudicial effect of the admitted evidence substantially and unfairly outweighed its probative value, primarily because the other-acts evidence involved behavior significantly different than that for which Hunt was being tried. Although the circuit court could have mitigated the unfairly prejudicial effect of the evidence by giving a cautionary instruction to the jury about the purposes for which the evidence was admitted and the proper use of that evidence in their deliberations, it gave no such instruction. *See* ***id.*** at 791 (cautionary instruction can ameliorate adverse effect of other-acts evidence). While it is doubtful

> that, given the nature of the other-acts evidence allowed, a cautionary instruction could have reduced the prejudice to Hunt to such a degree that the evidentiary ruling could have been upheld, the circuit court's failure to give such an instruction further solidifies our conclusion that admission of the evidence was erroneous and unfairly prejudiced Hunt's defense.

(App. A-6). Thus, having concluded the use of the other acts evidence failed prong three of the *Sullivan* test, it was not necessary for the appellate court to independently review the record to examine other potentially permissible purposes for, and the arguable relevance of, the evidence.[5]

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[5] Furthermore, although the appellate court did not explicitly discuss the relevance of the evidence, implicit in its observation that "the other-acts evidence involved behavior significantly different than that for which Hunt was being tried" is the idea the other acts evidence was not particularly relevant.

C. Contrary To The State's Claim That The Appellate Court Believed *No Cautionary Instruction Was Given*, The Appellate Court's Holding Regarding The Prejudicial Effect Of The Other Acts Was Solidified By The Fact That *A Proper Cautionary Instruction Was Not Given*.

Furthermore, even had the court of appeals independently reviewed the record and concluded, for example, that "context" was a permissible purpose for the other acts evidence, it could not go back and change the inadequate cautionary instruction given the jury and undo the unfair prejudice thereby visited upon Hunt. Indeed, the appellate court noted its decision was solidified by the failure to give a proper cautionary instruction. The State, however, now turns this rationale on its head by claiming the appellate court misapprehended the record and erroneously believed no cautionary instruction was given at all. The State is wrong and its argument gathers all of its momentum by taking the appellate court's remarks out of context.

It must not be forgotten that the State's principal position at trial, before the appellate court, and again before this Court, is that the evidence was permissible to show "the context" of the crimes. At trial, the State presented a protracted argument as to why the other acts were needed to show

"the context" of Hunt's alleged crimes. (R71-28-33). Indeed, during the course of that argument, the State noted:

> The Court can always give a cautionary instruction indicating that **this is to be admitted only for the purposes of the context in which the police investigation occurred** and is not to be used to make a determination that Mr. Hunt is a bad person or that he acted in conformity. **It is necessary to explain what is going on in this household**. . . .

(R71-33) (emphasis added). Nowhere in the State's argument was reference made to motive, opportunity, or any other of the enumerated permissible purposes in section 904.94(2), Stats.

Indeed, even after the court specifically inquired as to what specific purposes under section 904.04(2), Stats., the State relied on, the prosecutor again replied:

> Well other than the context which is not -- the Court knows that under 904.04(2) that is illustrative and not exhaustive. . . .

(R71-33). Then, as an afterthought, the State suggested the evidence would also go to the defendant's state of mind, the victim's state of mind, and also the absence of mistake or

accident. Rather than relating these ostensible purposes to the concept of *mens rea*, however, as they were intended, the State hypothesized that the absence of mistake would be that there was no mistake in the testimony when several witnesses related a similar story. (R71-34). The State then quickly agreed with the court when, without a clear rationale, it *sua sponte* declared motive and opportunity also applicable. (*Id.*).

On appeal, the State followed a similar pattern. Acknowledging the trial court ruled the prior bad acts admissible to show motive, opportunity, intent and absence of mistake or accident, the State first echoed this rationale by arguing "the prosecutor offered the evidence for *several* permissible purposes." (State's Appellate Brief, p. 11) (emphasis added). Thereafter, however, the State addressed just one permissible purpose, arguing only that the evidence was needed to "provide a context in which the jury could make valid assessments of the truth or falsity of witnesses' testimony." (State's Brief, p. 12). The State did not refute Hunt's arguments as to why all of the other section 904.04(2) factors were improper. *See Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (arguments not refuted are deemed admitted).

Contrary to the State's representations to this Court, the appellate court knew, because it was fully briefed by

both parties, that although a cautionary instruction was given as to motive, opportunity, intent, preparation, plan, absence of mistake and accident, there was no cautionary instruction advising the jury the evidence should be used to establish "the context" of the crimes. Nor, for that matter, was the jury instructed on how to use that evidence as it related to the corpus of the crimes, the witness's credibility, or anybody's state of mind. Thus, the error, according to the court of appeals, was not the failure to give any cautionary instruction at all, but instead, in the court of appeals' own words, to "giv[e] a cautionary instruction . . . about the purposes for which the evidence was admitted and the proper use of that evidence in their deliberations. . . ." (App. A-6).

This observation, despite the State's protestations to the contrary, was not only correct, but further consistent with this Court's decision in *Sullivan*, decided two years earlier. The failure to tell the jury why they were given thirty years of Hunt's alleged physical and drug abuse resulted from the kind of sloppy analysis against which this Court railed in *Sullivan*. Rather than identify a focused and reasoned analysis of why the evidence was being offered, the same old "laundry list" approach was employed. Consequently, the jury was advised to use the other acts evidence for purposes which did not make any sense under the facts adduced at trial, thereby greatly increasing the danger it would use the evidence for the only purpose which made sense: to show

Hunt was a bad man. The court of appeals was therefore justified in concluding the unfair prejudicial effect of the evidence significantly outweighed its probative value since, even if there was a probative value, it was never properly explained to the jury.

It should also be noted the State again takes the same approach before this Court. After giving a nod to the several "permissible purposes" articulated by the trial court, (State's Brief, p. 29), the State turns to the only purpose it has ever explained throughout these proceedings as a basis for admission:

> The court of appeals did not go on and determine whether the circuit court correctly admitted the other-acts evidence **under the "context" rationale**, a determination that an independent review of the record would have yielded.

(State's Brief, p. 22) (emphasis added). The problem, left unaddressed by the State, is that even had the appellate court conducted the review the State requests, and even had it adopted the position on "context" the State advances, it could not go back and instruct the jury as to the truly proper

use of the evidence. Contrary to the State's first issue presented, this was an adequate *Sullivan* analysis.[6]

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[6] Because "context" is the only purpose that has been adequately argued on this record, the State's ultimate position boils down to a belief that the general bar on the use of the other acts evidence has deteriorated to such a degree that the prosecution may now use prior bad acts and the jury no longer even needs to be apprized of the real reason for their admission.

II. THE COURT OF APPEALS SHOULD NOT BE OBLIGED TO SCOUR THOUSANDS OF PAGES OF APPELLATE RECORD TO INDEPENDENTLY REVIEW AN EVIDENTIARY RULING BY THE TRIAL COURT WHICH, ON ITS FACE AND IN ITS APPLICATION, WAS FUNDAMENTALLY FLAWED.

In the event this Court rules the court of appeals review was insufficient, and further, that it must conduct an independent review even when the trial court has exercised its discretion, but has done so erroneously, for public policy reasons this Court should nevertheless relieve appellate courts from doing so when the ruling is as fundamentally flawed as the one in this case.[7]

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[7] It appears the court of appeals is required to review the record when the trial court fails to exercise its discretion, *see Martindale v. Ripp*, 2001 WI 113, ¶29, 246 Wis. 2d 67, 629 N.W.2d 698; *State v. Pharr*, 115 Wis. 2d 343, 340 N.W.2d 498 (1983), but such an independent review is discretionary when the trial court does exercise its discretion but does so erroneously. *See State v. Pittman*, 174 Wis. 2d 255, 268-69, 496 N.W.2d 74 (1993); *Rodak v. Rodak*, 150 Wis.2d 624, 632 n.6, 442 N.W.2d 489, 493 (Ct. App. 1989); *Pharr*, 115 Wis. 2d at 343.

A. The Trial Court Improperly Relied On The Very Reason Such Evidence Is Generally Excluded As A Basis For Its Admission.

When the issue of prior acts evidence arose in this case in 2000, the trial court ostensibly had the benefit of this Court's decision in *Sullivan*. In searching for a permissible purpose for admission of the other acts, the State relied largely on the idea they would corroborate the original allegations of Ruth on the present charges, (R71-30), explain why the police searched the house for certain items, (R71-31), and bolster the credibility of the witnesses. (R71-32). When the trial court pressed for a specific purpose under section 904.04(2), Stats., the State suggested, without elaboration, absence of mistake and accident. (R71-34).

The trial court held the other acts evidence admissible to show motive, opportunity, intent and absence of mistake or accident. (R71-37-38). However, contrary to the command of *Sullivan*, there was no careful analysis of how the other acts, and the ostensibly permissible purposes, related to the charges pending. (R71-37-39). Instead, the court simply ordained the other acts evidence admissible with the most revealing aspect of the analysis being the court's remark that:

> It goes to the credibility of the people, I grant you, but it -- **but it also goes to whether or not contextually in this case here to show whether or not [Hunt] acted in conformity therewith.**

(R71-38) (emphasis added). This reasoning to support admission of the other acts was remarkable given that this is precisely the basis for the general prohibition against such evidence. *See* Section 904.04(2); *Sullivan* at 781-82.

B. In Reasoning The Other Acts Evidence Would Be Admissible, The Trial Court Improperly Relied On The Greater Latitude Rule.

Equally disturbing was the trial court's heavy reliance on the greater latitude rule as a *post hoc* justification for allowing this evidence. (R71-39-41). This error alone constituted an erroneous exercise of discretion. *State v. Madlock*, 230 Wis. 2d 324, 329, 602 N.W.2d 104 (1999). As Hunt noted at the motion hearing, the greater latitude rule applies when other acts of sexual assault against a child are involved. (R71-39). The trial court, however, did not bother to distinguish between the different types of prior acts proffered by the State or otherwise explain how the greater latitude rule applied to the particulars of those acts. Instead, the trial court merely invoked the specter of the greater latitude rule, simply because some of the charges

involved the sexual assault of a child, and broadly used it to further justify its across-the-board admission of all the prior acts evidence sought by the State.[8]

Wisconsin courts allow a greater latitude for admissibility of prior sex acts when a defendant is charged with a sexual assault involving children, or in cases of incest. *See, e.g.*, *State v. Davidson*, 2000 WI 91, 236 Wis. 2d 537, 613 N.W.2d 606; *State v. Hammer*, 2000 WI 92, 236 Wis. 2d 686, 613 N.W.2d 629. The rationale for allowing such evidence is that it overcomes the jury's natural difficulty in believing an individual could have a sexual appetite for children. *State v. Friedrich*, 135 Wis. 2d 1, 27-28, 398 N.W.2d 763 (1987). Thus, an examination of all the cases invoking that rule reveals that without exception, the other acts deemed admissible were prior sex acts, most involving children, having some parallel to the charged crimes. As Hunt pointed out at trial, however, the greater latitude rule has no application when the other acts do not involve acts of a sexual nature against a child. (R71-39).

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[8] The State characterizes the evidence on this issue as also including sexual abuse of Ruth. (State's Brief, pp. 7-8). Thereafter, however, there is no reference to any such evidence. This is because this particular issue involves only alleged physical abuse, drug use, threats, theft and possession of weapons.

Now the State, citing *State v. Davidson*, 2000 WI 91, ¶42, 236 Wis. 2d 537, 613 N.W.2d 606, rejects this understanding of the rule, claims the appellate court fundamentally misunderstood the rule, and argues that "[r]ather, the rule concerns the difficulty sexually abused children experience in testifying, and the difficulty prosecutors have in obtaining admissible evidence in such cases." (State's Brief, p. 33) (quotations omitted). The State completes this point by citing *Sullivan* for the proposition that the similarity between the other acts and the charged acts bears on the assessment of probative value, and then cites no authority for its assertion that this does not mean the absence of similarity precludes application of the greater latitude rule. The reasoning leading to the gist of the State's argument - that the greater latitude rule applies when sexually abused children testify regardless of the nature of the other acts proffered - is so convoluted that Hunt scarcely knows where to begin.

To the extend the State's argument draws some of its inertia from *Sullivan*, it should be remembered *Sullivan* never addressed the greater latitude rule. *Davidson*, too, is poor authority for the State's argument because the prior act was the sexual assault of a six-year-old girl, which is consistent with the appellate court's understanding of the rule, as is *Davidson*'s reasoning that:

> To a person of normal, social and moral sensibility, the idea of the sexual exploitation of the young is so repulsive that it's almost impossible to believe that none but the most depraved and degenerate would commit such an act. The average juror could well find it incomprehensible that one who stands before the court on trial could commit such an act.

Davidson 2000 WI 91 at ¶42. The fundamental flaw in the State's argument is that it confuses the *reasons* for the greater latitude rule's adoption with the *circumstances* under which it may be invoked. In so doing, it divorces the prior acts from the purpose for which they are offered - to overcome a jury's predisposition to doubt a defendant may have an appetite for a child - and instead attaches them to the circumstances under which they are offered - the mere fact a child victim of sexual assault takes the stand. To see this more clearly, we must turn to *State v. Friedrich*, 135 Wis. 2d 1, 398 N.W.2d 763 (1987), the source for *Davidson*'s general observation.

Friedrich, too, addressed prior acts which consisted of sexual assaults of children and its discussion of the greater latitude rule revolved largely around the need to overcome a jury's reluctance to believe an individual (i.e., the defendant) could have a sexual appetite for children. *Friedrich*, 135 Wis. 2d at 22-30. Upon completing this point,

Friedrich, cognizant it was expanding the rule's scope, turned to "the reasons why a more liberal admission of other cries evidence . . . in . . . sex crimes cases was justified." *Id.* at 31. In this larger context, *Friedrich* acknowledged the difficulty sexually abused children have in testifying and noted proposals to videotape their examinations and cross-examinations and allowing support persons to be present to soften the ordeal.

By tracing the State's argument back to its origin, it can be seen that Wisconsin courts have never held the mere taking of the witness stand by an alleged child victim of sexual assaults *ipso facto* invokes the general latitude rule. Instead, Wisconsin courts have merely noted that the difficulties such witnesses experience comprise the *a priori* justification for the adoption of relaxed evidentiary rules. The rules themselves, however, stand independent of the justification and while we may generally have rules like the greater latitude rule because of difficulties inherent in prosecutions of child sexual assault cases, we specifically have the greater latitude rule to overcome a jury's predisposition to doubt such acts actually occur. Accordingly, the applicability of the rule, as the appellate court properly noted, cannot be divorced from the nature of the prior acts in question from which their purpose, relevance, and probative value all derive.

C. The Trial Court Did Not Carefully Analyze The Alleged Prior Acts Nor Even Attempt An Individual Analysis Of Each Act.

The other acts introduced in this case were legion. Throughout the entire trial and via numerous witnesses, the State introduced evidence alleging, *inter alia*, that in the past:

(1) Hunt had been reported to police for using drugs (R73-75);

(2) Ruth sought a restraining order against Hunt on three separate occasions, alleging on one occasion that Hunt said his friends could kill her (R73-75-76);

(3) Ruth had alleged Hunt had pushed her around and hit her with a big knife (R73-77);

(4) Hunt threatened to mess Ruth up so much that nobody would recognize her (R73-78);

(5) Hunt had "busted [Ruth's] head" (R73-78);

(6) Hunt "busted [Ruth's] mouth open causing her to need 22 stitches back in the early 1970s when they were teenagers" (R73-78-79);

(7) Hunt had slapped, kicked and put a knife to Ruth (R73-79-80);

(8) Hunt struck Ruth in the face causing a cut to the inside of her cheek (R73-86);

(9) Hunt threatened to kill Ruth with a gun and a gun was found in Hunt's bedroom (R73-87);

(10) Hunt hit Ruth in the chest with a closed fist (R73-88);

(11) Hunt had punched a pregnant Angelica three or four times in her ribs, bruising her ribs (R74-57-58);

(12) Hunt had done physical, bad, painful and harmful things to Ruth, Angelica and Tiffany in the past. (R74-37-38);

(13) Hunt stole money from Angelica's purse (R74-59);

(14) On another occasion, Hunt was arrested by police for physically abusing Angelica (R74-59);

(15) Hunt had been seen choking Ruth (R74-78).

Without exception, each of these acts was allowed without the slightest individual analysis under the *Sullivan* paradigm, despite the fact the prosecutor conceded that only some of the acts might be admissible. (R71-33).

While the State argues the trial court "briefly explained" why it was letting the evidence in, (State's Brief, p. 21), it dares not argue the court "carefully" conducted a *Sullivan* analysis. The failure to carefully analyze each act and fit it to an exception in section 904.04(2), Stats., is particularly disturbing. The court initially articulated the usual laundry list for allowing the acts into evidence: motive, opportunity, intent and absence of mistake or accident. (R71-39-40). When defense counsel asked the court to elaborate on these bases, the trial court again painted with a broad brush:

> But certainly there is a motive involved here as to what is involved with the ongoing nature of the alleged allegations. Certainly there is an opportunity for doing these things. They are in the same household under the circumstances involved. His intent was to gain access by whatever means he

> felt was appropriate, and certainly to say well that is crazy but the ongoing nature of the allegations which certainly go to absence of mistake or accident.

(R71-40).

The problem with the above-quoted passage is that at the end of the day, it is a whole lot of nothing. It was incumbent upon the trial court, for example, to analyze and explain how the concept of "opportunity" linked each prior act and the current charges in a way which made: (1) admission of the former acceptable and relevant; and (2) its probative value *substantially* outweighed by the danger of unfair prejudice. Merely reciting that "[c]ertainly there is an opportunity for doing these things" does not come close to accomplishing this. As a rationale, it is woefully inadequate to justify the use of a whole panoply of prior acts.

This flaw presented an especially daunting problem for the appellate court. The use of other acts evidence was so pervasive that at times, it overtook and superseded the actual issues before the jury. Because the court never individually analyzed how any of these acts pertained to the issues being tried, there was nowhere in the record to which the appellate court could turn as a starting point for an independent analysis. Instead, the whole corpus of prior acts, regardless of the individual nature of each, regardless of when each

occurred or its remoteness in time, and regardless of how each might have related to the pending charges, was painted with the gloss of the greater latitude rule and summarily ushered into evidence.

The trial court's failure to place most of the prior acts in their appropriate temporal context would have been particularly frustrating for the appellate court. Consequently, acts which occurred more than 30 years prior to the acts with which Hunt was charged were swept into the record along with acts which occurred "after" the acts set forth in the criminal complaint.[9] No effort was made to determine whether a particular act might be too remote in time or perhaps not particularly probative of the proffered permissible purpose because it occurred "after" the allegations placed before the jury.

Independently reviewing each of these acts and then processing them through the *Sullivan* template would have been a logistical nightmare for the appellate court. Many of the acts were of questionable value because, for reasons left undeveloped on the record, they were allegations authorities did not take seriously enough to follow through with charges. The underdeveloped record regarding the prior acts

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[9] Hunt brought these temporal concerns to the trial court's attention. (R71-35).

was a foreseeable consequence of the lack of the careful analysis mandated by *Sullivan*. To require the court of appeals to independently review the prior acts' admissibility under these circumstances would not only be mandating the impossible, but would effectively convert the court into "a performing bear." *See*, *State v. Waste Management of Wis., Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978). Indeed, such a ruling would require the appellate court, in this case, to review over 1,000 pages of transcripts and other record documents and compare them to all of the potentially permissible purposes which, the State is fond of noting, extend well beyond the nine purposes outlined in section 904.04(2), Stats.

Although legal issues can rarely be reduced to statistical analysis, Hunt nevertheless notes the potential gravity of the problem can be understood as follows. Assuming just 12 permissible purposes for prior acts evidence, and using just 15 of the prior acts introduced by the State, and given the three prongs of the *Sullivan* test, the appellate court would potentially have to engage in 540 (12 x 15 x 3) separate legal inquiries to fully and independently review the record in the plenary manner advanced by the State.

III. EVEN HAD THE APPELLATE COURT INDEPENDENTLY REVIEWED THE RECORD AND EXERCISED ITS DISCRETION, THE RESULT WOULD HAVE BEEN THE SAME.

Assuming, *arguendo*, the appellate court was obliged to undertake a burdensome and full independent review of the record, this Court may either choose to remand to the appellate court for such a review or conduct the review itself. Either approach, however, will yield the same result as the record reveals that under any reasonable analysis, admission of Hunt's prior acts was improper. Unfortunately, as noted earlier, the sheer magnitude of the inquiry makes a full exposé of the issues impossible within the word limits governing a brief of this nature. Nevertheless, the general review of the issues below establishes this point.

A. The Other Acts Evidence Were Not Offered For A Permissible Purpose.

In applying prong one of the *Sullivan* test, there was no permissible purpose for allowing the State to introduce allegations of prior domestic battery against Hunt, particularly given the inapplicability of the greater latitude rule. Contrary to the trial court's musings, whether Hunt had a history of violent behavior revealed nothing about whether he possessed the requisite motive or intent when he

had sexual contact with Tiffany as alleged in Count One. Moreover, none the crimes charged regarding Tiffany include motive or intent as elements.

Similarly, a history of violent conduct with Ruth says nothing about opportunity to sexually assault another individual. Finally, because Hunt never maintained there was accidental sexual contact, absence of mistake or accident could not be a permissible purpose for the other acts evidence. Indeed, in a trial where Ruth was not a victim, it is difficult to conceive, for example, what purpose would have been served by, or what relevance could have been gleaned from, admitting highly prejudicial allegations that more than thirty years ago, Hunt battered Ruth requiring her to receive twenty-two stitches. The prejudicial effect of such inflammatory evidence simply overwhelmed the absolute absence of probative value in a trial which focused on non-violent, albeit admittedly illegal, sexual contact with a minor. This evidence served no purpose other than to portray Hunt as a bad man.

The trial court also reasoned the other acts evidence addressed the witness's credibility. It is not surprising, however, that when making this point, the court concomitantly acknowledged it would show Hunt acted in conformity with his bad character. (R71-38). Indeed, if the other acts were used to resolve a credibility issue, with one version alleging that Hunt committed the crimes charged,

and another version positing that he did not, they did so by demonstrating a proclivity not merely to commit crimes of the nature charged in this case, but a proclivity to commit crimes period.

To say prior bad acts can be used to resolve credibility issues is merely a euphemism for saying prior bad acts can be used to establish the defendant's bad character and his proclivity to commit crimes, the by-product of which is his reduced credibility. Indeed, such a rule would open wide the door for admission of other acts as there are credibility issues in virtually every trial. When the use of other acts is completely divorced from any of the permissible purposes under section 904.04(2), Stats., all that remains, particularly when the prior acts are dissimilar to the crimes charged, is that the defendant is a bad person with a propensity to commit crimes. In this case, the prior bad acts would "resolve" the credibility issue by suggesting Tiffany was probably telling the truth when she alleged a sexual assault against Hunt to police, and probably lying when she testified under oath at trial that Hunt did not sexually assault her, because Hunt must be capable of bad acts since, *inter alia*, he battered Ruth more than 30 years ago.

B. The Other Acts Evidence Was Not Relevant.

Assuming, *arguendo*, that the prior bad acts were ostensibly admissible to show "the context" of Hunt's alleged crimes, the putative relevance of such evidence is questionable. First, to the extent the State believed Hunt's dangerous character was needed to show why witnesses recanted, a few of the prior allegations taken from the temporal and spatial context in which the crimes allegedly occurred would have sufficed. The relevance of each new act, however, waned as they piled one upon the other and reached back to acts from 30 years prior. Moreover, since the prior acts could only affect a witness's testimony if she is aware of them, it is interesting to note the State made no attempt to show knowledge by Tiffany, for example, of the prior acts. Since five of the six charges involved Tiffany, while virtually none of the prior acts were perpetrated against Tiffany, they were largely irrelevant in fulfilling State's desire to show why it believed Tiffany recanted.

Finally, it is interesting to note the introduction of the prior acts could have had precisely the opposite effect intended by the State. If Hunt, who remained incarcerated throughout the proceedings and was facing the equivalent of a life sentence in prison, was greatly feared by Tiffany and the others, this was their perfect opportunity to testify truthfully (if indeed Hunt had done as alleged) and permanently

extend the removal of this man from their lives. The fact their testimony instead exculpated Hunt could tend to show, in the light of the prior acts, that their testimony was truthful. That the prior acts could therefore cut both ways demonstrates a diminution of their probative value and consequently, their relevance.

C. The De Minimis Probative Value Of The Other Acts Evidence Was Substantially Outweighed By The Danger Of Unfair Prejudice.

In applying prong three of the *Sullivan* test, the allegations of prior domestic battery were extremely prejudicial to Hunt for several reasons. First, the allegations pervaded every aspect of the trial. This was not a case where the other acts were addressed on a single occasion, packaged neatly with a permissible purpose on a specific point, and presented to the jury as such during closing argument. On the contrary, witness after witness was questioned about the prior allegations. (*See*, *e.g.*, R73-74-89 where fifteen solid pages were devoted to examining Ruth on a litany of prior bad acts). Indeed, the State went as far as introducing into evidence petitions for restraining orders Ruth executed years earlier. (R73-80, 85-86).

Second, the prior bad acts alleged were very inflammatory. They involved alleged beatings so severe they

resulted in the need for stitches. Other acts involved repeated threats of homicide. Other acts involved punching pregnant women, chronic smoking of crack cocaine and abusing people with sledgehammers and jackhammers. One cannot cavalierly minimize the impact of such evidence on a jury.

Third, this Court has already expressed skepticism about the ability of a limiting instruction to keep in check the natural tendency to imagine a defendant guilty of the crimes charged because he is a person likely to commit such acts. *Sullivan* at 791-92. Any potential prophylactic effect is entirely lost when the jury is not advised of how the other acts can be properly used. Even the most compelling purpose for allowing other acts evidence is unjustifiable if the jury is not instructed accordingly because absent such an explanation, there is a substantial danger the jury will use it for an impermissible purpose.

The public policy underlying the other acts rule is brought into particularly sharp focus in this case. In the wake of a litany of horrible acts of violence, there was a high probability the jury would convict Hunt on at least some of the charges because he appeared to be a person likely to commit crimes. *See Whitty*, *supra*, at 292. There was also a very real danger the jury would convict Hunt because he escaped punishment for his past transgressions. *Id*. This was a particularly dangerous possibility given that the district

attorney, in her examination of Ruth, expressly highlighted the fact that although the police became involved in some of Hunt's prior bad acts, Ruth never followed through with pressing charges and accordingly, Hunt escaped punishment. (R73-87-89) (e.g., "You didn't follow through with that case, either; correct?"). The district attorney employed the same tactic during her examination of Angelica. (R74-60) ("It is true, though, that you never did follow through with any kind of prosecution relating to Mr. Hunt, right?")

Moreover, insofar as defense counsel had not been provided the police reports from which the other acts were taken, and was plainly surprised by the domestic battery history unveiled on the morning of trial, it was unjust to attack Hunt, who was not prepared to demonstrate the other acts, or at least some of them, were fabricated. (R71-34-35). Finally, given the sheer number of prior bad acts Hunt was alleged to have committed, the number of alleged victims, the failure of the district attorney to establish a temporal context for the commission of all the prior bad acts, the different addresses and locations where the acts were committed, the different kinds of acts allegedly committed, there was a real danger there would be a confusion of issues at trial.

The practical consequences this lazy approach worked on Hunt's right to a fair trial could not have been more catastrophic. During long portions of the trial, Hunt was

portrayed as a man with a protracted history of physical abuse and illegal drug use and, it was neatly highlighted, he had escaped punishment for most, if not all, of these acts. Then, however, the jury was **never** advised of the ostensibly proper manner the State now advances for using this evidence. Instead, the jury was told to use this horrific biography in a manner the State belatedly concedes did not fit the facts. As was the case in *Sullivan*, "the circuit court did not tailor the cautionary instruction to the facts of the case." *Sullivan*, *supra* at 780. Under these circumstances, the only remaining use of this evidence would be for precisely the reasons it is generally excluded. While the State's explanation of how the evidence *could have been* employed may be eloquent, it rings rather hollow since it was never explained to the jury.

IV. WHEN A LITANY OF PRIOR BAD ACTS IS IMPROPERLY ADMITTED INTO EVIDENCE THEREBY INFECTING THE ENTIRE TRIAL, AND THE JURY IS NEVER INSTRUCTED AS TO THE BASIS THE STATE PURPORTS TO USE THE EVIDENCE, AN APPELLATE COURT CANNOT DIVINE UPON WHICH COUNTS THE EVIDENCE PREJUDICED THE DEFENDANT, AND UPON WHICH IT DID NOT, AND THEREFORE REVERSAL ON ALL COUNTS IS APPROPRIATE.

A. The State Did Not Raise A Harmless Error Issue At The Appellate Court Level.

The State would have this Court examine the record below to determine whether there was a reasonable possibility the errors contributed to each of the convictions. In advancing this position, the State carefully avoids the phrase "harmless error" but it is undeniable this is the thrust of its argument. This "truth-in-advertising" violation likely stems from the fact the State it never advanced a harmless error argument at the court of appeals level. An issue not raised at the appellate court level is deemed waived. *State v. Brown*, 96 Wis. 2d 258, 263, 291 N.W.2d 538 (1980). The State should not fault the appellate court for not doing that which the State never asked it to do.

B. The State Sought Introduction Of The Evidence For Reasons Which Related To All Of The Charges And Should Not Now Be Heard To Claim That One Charge Can Be Isolated And Insulated From The Highly Prejudicial Evidence.

Instructive on the paramount importance of ensuring that an error, once identified, is taken with grave seriousness, was this Court's lament in *State v. Dyess*, 124 Wis. 2d 525, 370 N.W.2d 222 (1985):

> This court for years has been struggling with methodology to rationalize upholding a conviction despite the acknowledgment that error has been committed. Certainly, many errors in the course of trial are of a trivial nature and affect the final result not one whit. Hence, it is reasonable in accordance with public policy and judicial economy, to confirm convictions unless it is apparent that the procedure has been unfair, rights have been subverted, or an injustice has been done. Most errors are truly harmless. Nevertheless, the great virtue of our legal system - at least its great objective - is that only the guilty be convicted and even the guilty be convicted only by due process of law after guilt has been demonstrated beyond a reasonable doubt. **Hence, when**

> **error is committed, a court should be sure that the error did not affect the result or had only a slight effect.** . . . When it is clear that error has been committed, we should be sure that the error did not work an injustice. The only reasonable test to assure this result is to hold that, where error is present, the reviewing court must set aside the verdict unless it is sure the error did not influence the jury or had such slight effect as to be *de minimis*.

Id. at 540-42.

Here, there can be no level of confidence the errors did not affect the outcome of the proceeding because the prior acts infected the entire trial. There is simply no way an appellate court can enter the jurors' minds and determine on which counts the prejudicial evidence may have affected their verdicts and on which it did not. The approach advocated by the State is common because where an error is not harmless, the necessary remedy is a new trial. However, as one judge has noted, many appellate judges apparently believe that, where "there is no legally sufficient evidentiary basis for a reasonable jury" to acquit the defendant, there is no point in ordering a new trial. *Stephens v. Miller*, 13 F.3d 998 (7th Cir. 1994) (Cudahy, dissenting). Thus, they essentially enter summary judgment for the prosecution, declaring any constitutional error to be harmless.

The only problem with this procedure is that it is patently unconstitutional. All criminal defendants - even the most guilty of them - have a constitutional right to have a jury, not an appellate judge, find them guilty beyond a reasonable doubt. The Supreme Court, speaking through Justice Scalia, has made the matter abundantly clear. The harmless error question asks:

> [N]ot what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. Harmless-error review looks, we have said, to the basis on which the "jury *actually rested* its verdict." The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered-- no matter how inescapable the findings to support that verdict might be-- would violate the jury-trial guarantee.

Sullivan v. Louisiana, 508 U.S. 275, 279, (1993) (citations omitted) (emphasis in original). The State in this case is

truly asking this Court to "hypothesize a guilty verdict that was never in fact rendered."[10]

The State believes that when other acts evidence is improperly admitted as to one particular count, that does not mean a new trial is warranted on a different count. The argument betrays a misunderstanding of the public policy reasons for generally excluding other acts evidence. Those reasons set forth in *Whitty*, *supra*, (i.e., defendant is a bad person, defendant escaped punishment, defendant unprepared to rebut, confusion of issues) cut equally across all counts of the indictment. Even more damning, the argument contradicts the State's very rationale for offering the other acts evidence in the first place, since the context of the crimes, the credibility of the witnesses, etc., are also concepts which apply equally to all of the charges.

Particularly disingenuous is the State's effort to characterize Hunt's appellate level position as not contesting the pregnancy charge on the basis of the other acts evidence.

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[10] Where an error so infects a trial it would be impossible to determine that the error did not affect the jury verdict, harmless error analysis is infeasible, and a rule of *per se* reversal applies. *See* Charles J. Ogletree, Jr., Arizona v. Fulminante: *The Harm of Applying Harmless Error to Coerced Confessions,* 105 Harv. L. Rev. 152, 162 (1991).

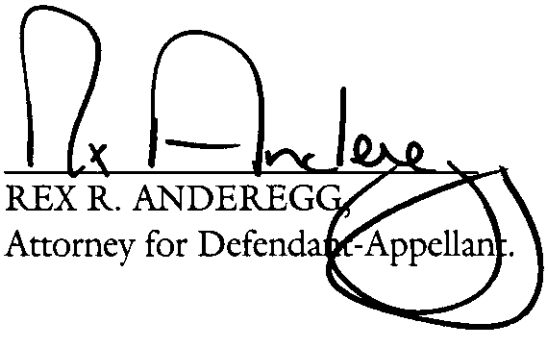
(State's Brief, p. 35). The State constructs this misrepresentation by taking a separate, unrelated argument Hunt advanced on the pregnancy charge (i.e., use of the rape shield to block evidence of Tiffany's sexual relations with his son) and mischaracterizing it as Hunt's only challenge to that charge. (*Id.*). This argument conveniently ignores that Hunt advanced his other acts argument as to all the charges.

Making appellate courts winnow and sift through which convictions should stand and which should be reversed under these circumstances makes no sense. How is a higher court to determine on which counts the jury convicted the defendant because it believed he was likely to commit such acts and on which this inference did not matter? Similarly, how can an appellate court decide on which counts the jury convicted because it believed the defendant was a bad man who had escaped punishment for prior acts and on which it did not? Finally, how can an appellate court distinguish on which counts the jury was confused and on which it was not? Drawing such distinctions is especially impossible when the prior acts evidence was not introduced as to one particular charge, but instead, for reasons which equally affect all of charges. Moreover, Wisconsin courts have already recognized the improper admission of prejudicial evidence can so completely infect a trial that a new trial is necessary on all counts. *See, e.g.*, *State v. Samuel*, 2001 WI App 25, 240 Wis. 2d 756, 623 N.W.2d 565; *Sullivan*, *supra*; *State v. Locke*, 177 Wis. 2d 590, 502 N.W.2d 891 (Ct. App. 1993).

CONCLUSION

For all of the foregoing reasons, Hunt respectfully requests this Court affirm the court of appeals decision in all respects. In the event this Court reverses, in whole or in part, the appellate court's decision, Hunt requests this Court remand to the court of appeals for a redetermination of the other acts issue and, if necessary, all of the other issues Hunt raised on appeal.

Dated this 14th day of February, 2003.

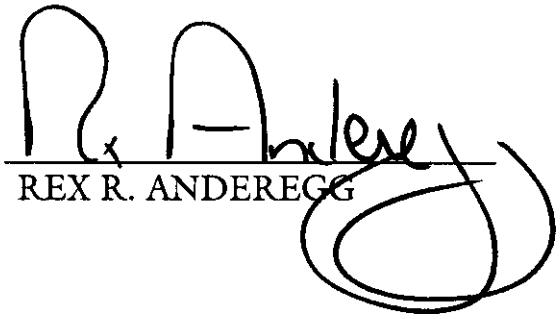


REX R. ANDEREGG,
Attorney for Defendant-Appellant.

CERTIFICATION

I certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced using a proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, minimum 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 10995 words.

Dated this 14th day of February, 2003.



REX R. ANDEREGG

APPENDIX

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July 17, 2002

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You are hereby notified that the Court has entered the following opinion and order:

01-0272-CR State of Wisconsin v. John P. Hunt (L.C. #99 CF 4897)

Before Fine, Schudson and Curley, JJ.

A jury convicted John P. Hunt of two counts of first-degree sexual assault of a child, one count of repeated sexual assault of a child, one count of first-degree sexual assault – causing pregnancy, one count of exposing a child to harmful material, and one count of second-degree sexual assault by use of force. On the first five counts, the victim was the child of Hunt's girlfriend; on the sixth count, the victim was Hunt's girlfriend. Hunt received a total of 122 years in prison on four counts and probation on the two remaining counts. On appeal, he argues that the circuit court erred when it allowed the state to introduce evidence that Hunt had engaged in prior "bad acts," including illegal drug use and the physical and sexual abuse of his wife. Based upon our review of the briefs and record, we conclude at conference that this case is

appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (1999-2000).[1] Because we conclude that the circuit court erred in admitting the other-acts evidence and that the error was not harmless, we reverse the judgment of conviction and remand this matter to the circuit court for a new trial.[2]

The facts relevant to this decision are largely undisputed. Hunt lived with his wife, Ruth, another woman, Angelica J., and Angelica's daughter, Tiffany. Hunt and Ruth belonged to a church that encouraged male members of the congregation to have more than one wife. Hunt's living arrangement with Ruth and Angelica J. apparently reflected this belief. In July 1998, when Tiffany was fifteen years old, she gave birth to a child. The State filed a criminal complaint against Hunt that alleged numerous sexual assaults of Tiffany. The State alleged that Hunt was the father of Tiffany's baby. The State also charged Hunt with second-degree sexual assault of Angelica.

Ultimately, neither Tiffany nor her mother cooperated with the State in its prosecution of Hunt, and both denied the allegations of the complaint. The State, in a pretrial motion, sought the circuit court's permission to introduce evidence at trial that Hunt had engaged in criminal acts that were not the subject of the complaint. *See* WIS. STAT. § 904.04(2) (1997-98) (evidence of other crimes, wrongs, or acts not admissible to prove character of person to show that he acted in conformity therewith, but may be permitted for purposes such as proof of motive, opportunity,

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[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[2] Hunt raises numerous issues on appeal. We need not address the additional arguments because the circuit court's erroneous decision to allow the other-acts evidence was unfairly prejudicial to Hunt's defense and, as such, requires reversal of the conviction and a new trial. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (when decision on one point disposes of appeal, appellate court will not decide other issues raised).

intent, preparation, plan, knowledge, identity, or absence of mistake of accident). In support of its motions, the State argued that the prior acts of claimed abuse of Ruth by Hunt were "relevant and probative of the 'context' in which the sexual assaults occurred, and also part of the corpus of the crimes with which the defendant [has been] charged." The State also maintained that the evidence related "directly to the victim's state of mind." In regard to Hunt's alleged drug use, the State argued those allegations provided necessary background for understanding Hunt's behavior and also provided "an independent source of information about the credibility of [the victims'] various stories" that was "highly relevant" in light of the victims' "recantation."

Over defense objections, the circuit court granted the State's motion and admitted some of the "other acts" evidence requested by the State. It reasoned that the proffered evidence went "to whether or not contextually in this case ... [Hunt] acted in conformity therewith under ... rules of the other acts evidence." It further reasoned that the evidence was relevant and was not unfairly prejudicial to Hunt. The circuit court also held that, because the sexual assault of a child was alleged, caselaw permitted it "more latitude" in admitting other-acts evidence. ***State v. Davidson***, 2000 WI 91, ¶¶36-37, 236 Wis. 2d 537, 613 N.W.2d 606 (in cases involving sexual assault of a child, courts permit "greater latitude of proof as to other like occurrences"). In light of this ruling, the State introduced evidence at trial that Hunt had been reported to police for using drugs, that Ruth had sought restraining orders against Hunt on three prior occasions, that Hunt had verbally threatened Ruth and others, and that Hunt had physically abused Angelica and Ruth.

A circuit court's evidentiary rulings are reviewed for an erroneous exercise of discretion, and this court will not find an erroneous exercise of discretion if there is a reasonable basis for the circuit court's determination. ***State v. Chambers***, 173 Wis. 2d 237, 255, 496 N.W.2d 191

(Ct. App. 1992). "An appellate court will sustain an evidentiary ruling if it finds that the circuit court examined the relevant facts; applied a proper standard of law; and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach." ***State v. Sullivan***, 216 Wis. 2d 768, 780-81, 576 N.W.2d 30 (1998).

WISCONSIN STAT. § 904.04(2) "precludes proof that an accused committed some other act for purposes of showing that the accused had a corresponding character trait and acted in conformity with that trait. In other words, § (Rule) 904.04(2) forbids a chain of inferences running from act to character to conduct in conformity with the character." ***Sullivan***, 216 Wis. 2d at 782. The test to determine whether other acts or other crimes evidence may be introduced has a three-rule framework:

1. Is the other acts evidence offered for an acceptable purpose under Wis. Stat. § (Rule) 904.04(2)?
2. Is the other acts evidence relevant under Wis. Stat. § (Rule) 904.01?
3. Is the probative value of the evidence substantially outweighed by the danger of unfair prejudice, confusion, or delay under Wis. Stat. § (Rule) 904.03?

Davidson, 2000 WI 91 at ¶35.

We conclude that the circuit court failed to properly apply this framework in permitting the other-acts evidence against Hunt and thereby erroneously exercised discretion. First, the circuit court based its ruling in substantial part on two erroneous rationales. As noted, it first indicated that the other-acts evidence was admissible to demonstrate whether Hunt had, in the

crimes charged, acted in conformity with the character evidenced by his other alleged bad acts.[3] By the precise terms of WIS. STAT. § 904.04(2), this rationale cannot be the reason for admitting such evidence. The danger of unfair prejudice in admitting evidence for this reason is "that the jurors would be so influenced by the other acts evidence that they would be likely to convict the defendant because the other acts evidence showed him to be a bad man." ***Sullivan***, 216 Wis. 2d at 790.[4]

Second, the circuit court indicated that the other-acts evidence was admissible under the greater latitude rule, which permits a "'greater latitude of proof as to other like occurrences'" in sexual assault cases, "particularly cases that involve sexual assault of a child." ***Davidson***, 2000 WI 91 at ¶36 (citation omitted). Here, although most of the charges against Hunt involved the sexual assault of a minor, much of the other-acts evidence admitted by the circuit court was not of a sexual nature and little, if any, involved acts against a child. Thus, the evidence was

[3] In its response, the State concedes that to "the extent [the circuit court's] comment might suggest 'other acts' evidence can permissibly show conformity with a character trait, the court erred." The State suggests, however, that the circuit court "probably did not intend its inartful comment." The circuit court's stated rationale was, however, erroneous, and nothing in the record suggests that the circuit court did not use this rationale to support its ruling. Therefore, the circuit court erroneously exercised its discretion when it admitted the evidence for this reason.

[4] In fairness, the record demonstrates that the circuit court also indicated that it considered the other acts evidence admissible to establish the "context" of Hunt's charged crimes. Although "context" can be a reason to admit other acts evidence, *see, e.g.*, ***State v. Chambers***, 173 Wis. 2d 237, 255, 496 N.W.2d 191 (Ct. App. 1992), the circuit court did not explain how this evidence would establish that "context."

probably not admissible under the greater latitude rule because the other acts were not sufficiently similar to the crimes charged.[5] *Id.* at ¶¶36-37.

The record demonstrates that the circuit court erroneously exercised discretion in admitting the other-acts evidence and that, by allowing the evidence, it magnified the risk that the jurors punished Hunt "for being a bad person regardless of his or her guilt" of the crimes charged. *See* ***Sullivan***, 216 Wis. 2d at 783. We are satisfied that the prejudicial effect of the admitted evidence substantially and unfairly outweighed its probative value, primarily because the other-acts evidence involved behavior significantly different than that for which Hunt was being tried. Although the circuit court could have mitigated the unfairly prejudicial effect of the evidence by giving a cautionary instruction to the jury about the purposes for which the evidence was admitted and the proper use of that evidence in their deliberations, it gave no such instruction. *See* ***id.*** at 791 (cautionary instruction can ameliorate adverse effect of other-acts evidence). While it is doubtful that, given the nature of the other-acts evidence allowed, a cautionary instruction could have reduced the prejudice to Hunt to such a degree that the evidentiary ruling could have been upheld, the circuit court's failure to give such an instruction further solidifies our conclusion that admission of the evidence was erroneous and unfairly prejudiced Hunt's defense.

[5] Our use of the phrase "probably not admissible" points up the central problem here – although some of the other-acts evidence may have been admissible under various rationales, the circuit court failed to undertake the careful item-by-item analysis required by ***Sullivan*** for admission of other-acts evidence. *See* ***Sullivan***, 216 Wis. 2d at 774 (without careful analysis of the criteria for admitting other-acts evidence, likelihood of error at trial is substantially increased).

IT IS ORDERED that the judgment of conviction is summarily reversed pursuant to WIS. STAT. RULE 809.21 and this matter is remanded to the circuit court for further proceedings consistent with this opinion.

Cornelia G. Clark
Clerk of Court of Appeals

Sentence Wisconsin State Prisons

Date of Birth: 08-06-1949 Case No.: 99CF004897

The defendant was found guilty of the following crime(s):

Ct.	Description	Violation	Plea	Severity	Date(s) Committed	Trial To	Date(s) Convicted
1	1st Degree Sexual Assault of Child	948.02(1)	Not Guilty	Felony B	10-09-1994	Jury	06-23-200
3	Repeated Sexual Assault of Same Child	948.025(1)	Not Guilty	Felony B	12-28-1993 Between 9-30-1997	Jury	06-23-200
4	1st Deg.Sexual Assault/Great Bodily Harm	940.225(1)(a)	Not Guilty	Felony B	in or about 10-11-1997	Jury	06-23-200
5	Expose Child to Harmful Material - Sale	948.11(2)(a)	Not Guilty	Felony E	12-08-1993 Between 09-21-99	Jury	06-23-200

IT IS ADJUDGED that the defendant is guilty as convicted and sentenced as follows:

Ct.	Sent. Date	Sentence	Length	Concurrent with/Consecutive to/Comments	Agency
1	08-17-2000	State Prisons	40 YR	As to counts 1, 3, 4, and 5 consecutive to each other and consecutive to any other sentence. As to all counts defendant advised not to work or participate in activities or have contact with children under 16. Advised he must register as a sexual offender and is subject to sexual viiolent person petition.	DOC
1	08-17-2000	Restitution		Work up be completed within 90 days for counseling for Tiffany Johnson and be signed by the defendant and be paid from up to 25% of prison wages and as a conditon of parole, or court will determine restitution amount, wage assignment.	
1	08-17-2000	Costs		Be paid from up to 25% of prison wages and as a condition of parole or serve 60 days HOC consecutive until the amount is paid in full, and any unpaid amount will remain due and owing.	
3	08-17-2000	State Prisons	40 YR	As to counts 1, 3, 4, and 5 consecutive to each other and consecutive to any other sentence.	DOC
3	08-17-2000	Restitution		See count 1.	
3	08-17-2000	Costs		See count 1.	
4	08-17-2000	State Prisons	40 YR	As to counts 1, 3, 4, and 5 consecutive to each other and consecutive to any other sentence.	DOC
4	08-17-2000	Restitution		See count 1.	
4	08-17-2000	Costs		See count 1.	
5	08-17-2000	State Prisons	40 YR	As to counts 1, 3, 4, and 5 consecutive to each other and consecutive to any other sentence.	DOC
5	08-17-2000	Restitution		See count 1.	
5	08-17-2000	Costs		See count 1.	

State vs John P. Hunt

Judgment of Conviction

Sentence to Wisconsin State Prisons

Date of Birth: 08-06-1949

Case No.: 99CF004897

Conditions of Sentence or Probation

Obligations: (Total amounts only)

Fine	Court Costs	Attorney Fees	Restitution	Other	Mandatory Victim/Wit. Surcharge	5% Rest. Surcharge	DNA A Surcha
	80.00		TBD	5.00	280.00		250.0

IT IS ADJUDGED that **330** days sentence credit are due pursuant to § 973.155 Wisconsin Statutes.

IT IS ORDERED that the Sheriff execute this sentence.

Dennis P. Moroney-20, Judge
Miriam S Falk, District Attorney
David K Ziemer, Defense Attorney

BY THE COURT:

Court Official

8/18/00

Date

Judgment of Conviction

Sentence Imposed & Stayed, Probation Ordered

Date of Birth: 08-06-1949

Case No.: 99CF004897

The defendant was found guilty of the following crime(s):

Ct.	Description	Violation	Plea	Severity	Date(s) Committed	Trial To	Date(s) Convicted
2	1st Degree Sexual Assault of Child	948.02(1)	Not Guilty	Felony B	10-09-1994	Jury	06-23-2
6	2nd Degree Sexual Assault/Use of Force	940.225(2)(a)	Not Guilty	Felony BC	01-01-1999 Between 09-21-99	Jury	06-23-2

IT IS ADJUDGED that the defendant is guilty as convicted and sentenced as follows:

Ct.	Sent. Date	Sentence	Length	Concurrent with/Consecutive to/Comments	Agenc
2	08-17-2000	Probation Ordered	20 YR	Consecutive. Conditions as to counts 2 and 6.	DOC
6	08-17-2000	Probation Ordered	10 YR	Concurrent to count 2, but consecuitve to prison sentences. Conditions the same as count 2.	DOC

	Sentence(s) Stayed		Concurrent with/Consecutive to/Comments	Sent. Credit
2	State prison	20 YR	Consecutive	0 days
6	State prison	10 YR	Consecutive	0 days

Conditions of Sentence or Probation

Obligations: (Total amounts only)

Fine	Court Costs	Attorney Fees	Restitution	Other	Mandatory Victim/Wit. Surcharge	5% Rest. Surcharge	DNA A Surcha
	40.00		TBD	4.00	140.00		

Miscellaneous Conditions

Ct.	Condition	Agency/Program	Comments
2	Restitution		See count 1.
2	Costs		From up to 25% of prison wages and any balance to be paid during parole or serve 30 days each count consecutive in the HOC until the amount is paid in full, and any unpaid amount will remain due adn owing.
2	Alcohol treatment		AODA treatment. Random urine screens; 1st dirty screen serve 20 days HOC, straight time, 2nd dirty screen serve 30 days HOC, straight time; 3rd dirty screen court recommends revocation of probation.
2	Psych treatment		Mental health evaluation.
2	Prohibitions		No drugs or alcohol. No contact with children under 16 years of age.

State vs John P. Hunt

Judgment of Conviction

Sentence Imposed & Stayed, Probation Ordered

Date of Birth: 08-06-1949

Case No.: 99CF004897

2	Other	Sexual deviant treatment and counseling. Anger management. Register as a violent person.
6	Restitution	
6	Costs	
6	Alcohol treatment	See count 2.
6	Psych treatment	See count 2.
6	Prohibitions	See count 2.
6	Other	See count 2.

IT IS ADJUDGED that 0 days sentence credit are due pursuant to § 973.155 Wisconsin Statutes.

IT IS ORDERED that the Sheriff execute this sentence.

Dennis P. Moroney-20, Judge
Miriam S Falk , District Attorney
David K Ziemer, Defense Attorney

CIRCUIT COURT MILWAUKEE CO WISCONSIN SEAL

BY THE COURT:

Court Official

8-18-00

Date

STATE OF WISCONSIN

IN SUPREME COURT

No. 01-0272-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

JOHN P. HUNT,

Defendant-Appellant.

ON PETITION FOR REVIEW OF A DECISION OF THE WISCONSIN COURT OF APPEALS

REPLY BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT-PETITIONER STATE OF WISCONSIN

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STATE OF WISCONSIN

IN SUPREME COURT

No. 01-0272-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

JOHN P. HUNT,

Defendant-Appellant.

ON PETITION FOR REVIEW OF A DECISION OF THE WISCONSIN COURT OF APPEALS

REPLY BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER STATE OF WISCONSIN

The State stands by its principal brief in this court and by its brief in the court of appeals. The State's principal brief recapitulates and applies the pertinent standards, thus also serving in part as the State's reply.

Nonetheless, the State has additional comments.

I. THE COURT SHOULD IGNORE HUNT'S EFFORT TO REWRITE THE RECORD AND THE COURT OF APPEALS' DECISION.

The court should ignore the Potemkin-village-like façade Hunt erects to hide the court of appeals' decision. Hunt's Brief at 13-29. His attempt to rewrite the record

and the court of appeals' decision and to reconfigure *State v. Sullivan*, 216 Wis.2d 768, 576 N.W.2d 30 (1998), cannot camouflage the array of errors in the court's decision:

- Although acknowledging "context" as a permissible use for other-acts evidence, the court of appeals dismissively disregarded that use, chastising the circuit court not for any error in admitting the evidence for that purpose, but for not "explain[ing] how this evidence would establish that 'context.'" *Hunt*, slip op. at 5 n.4, Pet-Ap. 105 n.4. Here, the court of appeals used the alleged dereliction as a reason to ignore rather than trigger the appellate obligation to conduct its own independent review of the record to find reasons to support the circuit court's decision. The appellate opinion does not reflect *any* independent review or analysis consistent with *Sullivan*'s three-step algorithm,[1] thus violating *Sullivan*, 216 Wis.2d at 781 (citing *Pharr*), and an array of other cases, including post-*Sullivan* decisions in *State v. Derango*, 2000 WI 89, 236 Wis.2d 721, ¶ 37, 613 N.W.2d 833 (citing *Sullivan*), and *State v. Davidson*, 2000 WI 91, 236 Wis.2d 537, ¶ 53, 613 N.W.2d 606 (same).

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[1] *State v. Sullivan*, 216 Wis.2d 768, 576 N.W.2d 30 (1998), like Rule 904.04(2), "creates neither a presumption of exclusion nor a presumption of admissibility" for other-acts evidence. *State v. Speer*, 176 Wis.2d 1101, 1116, 501 N.W.2d 429 (1993). Rather, *Sullivan* creates a three-step algorithm for the exercise of judicial discretion when a circuit court must decide whether to admit or exclude other-acts evidence. If a circuit court applies the *Sullivan* algorithm incompletely, incorrectly, or not at all, an appellate court must do so. *Id.* at 781.

In effect, Rule 904.04(2) serves a narrow purpose: establishing a precondition for evaluating a specific category of evidence before assessing that evidence according to *Sullivan*'s remaining steps — essentially, acting as a gateway to the decisionmaking process that otherwise applies to admissibility decisions for all evidence.

- In treating the circuit court's reference to "propensity" (71:38; Pet-Ap. 129) as, in effect, the only reason the circuit court admitted the other-acts evidence, *Hunt*, slip op. at 3, Pet-Ap. 103, the court of appeals ignored four of the *five* permissible reasons offered by the prosecutor for using the evidence (16:3-4; 71:28-34, 57-59; Pet-Ap. 116-17, 119-25, 132c-132e) and accepted by the circuit court (71:37-38, 40, 60; Pet-Ap. 128-29, 131, 132f).

- By treating the "propensity" reference as the circuit court's reason for admitting the other-acts evidence, by ignoring four of the five permissible purposes accepted by the circuit court, and by dismissively denigrating the fifth permissible purpose, the court of appeals repudiated the principle that a court can admit other-acts evidence when the evidence serves even one permissible purpose. *State v. Murphy*, 188 Wis.2d 508, 518, 524 N.W.2d 924 (Ct. App. 1994) ("[e]vidence of other acts need only be relevant to one of the purposes enumerated in § 904.04(2) before it is admissible"); *cf. Whitty v. State*, 34 Wis.2d 278, 292, 149 N.W.2d 557 (1967) (explaining "multiple-admissibility rule"). Here, the court of appeals inverted the principle, functionally holding that a single reference to an impermissible purpose trumps as many as five permissible purposes.

- The court of appeals misapplied the "greater latitude" rule. The similarity or dissimilarity of the other acts goes to probativeness, *State v. Veach*, 2002 WI 110, ¶ 81, 255 Wis.2d 390, 648 N.W.2d 447, a *Sullivan* step-two issue. Here, however, the court of appeals did not even attempt to assess the probative value of the evidence. Instead, the court treated the similarity/dissimilarity question in terms of the "unfair prejudice" inquiry, which occurs in *Sullivan*'s third step — *after* an assessment of probativeness, an assessment the court of appeals' opinion does not contain, or even hint at. Moreo-

ver, the "greater latitude" rule applies in *all* sexual-assault cases, and especially in those (like Hunt's) involving children, *Davidson*, 236 Wis.2d 537, ¶ 36, and applies to each step in the *Sullivan* algorithm, *Veach*, 255 Wis.2d 390, ¶ 53. The court of appeals' opinion, however, appears oblivious to these standards.

- Perhaps most fundamentally, the court of appeals rejected the "well-established [principle] that if a trial court reaches the proper result for the wrong reason, it will be affirmed. Underlying this principle is the notion that if a second, error-free trial would lead to the same result, the first decision should be affirmed. An appellate court may sustain a lower court's holding on a theory or on reasoning not presented to the lower court." *State v. Holt*, 128 Wis.2d 110, 124-25, 382 N.W.2d 679 (Ct. App. 1985). Even assuming the circuit court completely erred in its reasoning (rather than, as here, made a single erroneous statement *in camera* in the course of explaining that the court had five valid bases for admitting the evidence), the foregoing principle, combined with the requirement of independent review, compelled the court of appeals to look for reasons in the record to support the admission of the evidence, *State v. Locke*, 177 Wis.2d 590, 598, 502 N.W.2d 891 (Ct. App. 1993) ("we search the record for reasons to sustain evidentiary rulings of the trial court"), not, as the court did here, to look for reasons to overturn the circuit court's discretionary decision.

Thus, when Hunt writes that "the trial court's faulty reasoning had an impact, as it should have, on the appellate court's decision," Hunt's Brief at 20, he captures the essence of the court of appeals' errors. The circuit court's alleged error had an impact, but the wrong one: rather than seeing the error as triggering the need for an independent review to find reasons to sustain the evidentiary ruling, the

appellate court treated the error as a reason to avoid that responsibility.

The lack of independent review shows most clearly in the court of appeals' declaration that the circuit court failed to give the jury a cautionary instruction on the use of other-acts evidence. Hunt defends the court of appeals' assertion by characterizing the flaw not as a failure to give the instruction, but as a failure to give an adequate instruction. Hunt's Brief at 24-29.

Hunt elides the inescapable core of the court of appeals' declaration. The appellate court did not refer in any way to the supposed inadequacy of an instruction. Rather, despite the State's explicit citations to the portion of the record containing the instruction, the court of appeals wrote that the circuit court did not give *any* cautionary instruction. *State v. Hunt*, No. 01-0272-CR, slip op. at 6 (Wis. Ct. App. July 17, 2002), Pet-Ap. 106 ("it gave no such instruction"). Hunt's defense rests on an untenable reading of the court's decision on this point.

In addition, Hunt has reversed course since trial. During the jury instruction conference (76:254-61; P-Ap. 133-40), the prosecutor asked about the omission of "context" from the other-acts instruction. She noted that she intended to argue the contextual value of other-acts evidence (76:257-58; P-Ap. 136-37) and did not want the jury instruction to preclude her from doing so. The circuit court specifically assured the prosecutor that the court had admitted the evidence on that rationale, that the prosecutor could use the other-acts evidence for her "context" argument, but that including a reference to "context" in the instruction posed complex definitional problems (76:258-59; P-Ap. 137-38). Consequently, the court said, rather than define "context" in the instruction, the prosecutor should simply argue the point to the jury (76:258-59; P-Ap. 137-38).

Hunt's lawyer did not object at any point during this discussion. He did not object to the prosecutor's intention

to argue "context" despite its absence from the jury instruction. And he did not object during the prosecutor's closing argument (77:35-62, 78-80), when she argued the other-acts evidence in terms of "context." At this point, his contention has the aroma of invited error. This court should reject Hunt's complaint. *Cf. In re Shawn B.N.*, 173 Wis.2d 343, 372, 497 N.W.2d 141 (Ct. App. 1992) (appellate court will not review invited error).[2]

II. THE COURT SHOULD REJECT HUNT'S "TOO MANY NOTES" STANDARD FOR DETERMINING WHEN AN APPELLATE COURT MUST CONDUCT AN INDEPENDENT REVIEW OF RECORD FOR REASONS TO SUSTAIN A CIRCUIT COURT'S DISCRETIONARY DECISION.

Following a rehash of earlier contentions, Hunt's Brief at 30-40, Hunt gets to the nub of his independent-review standard: if a case has too many pages or too many legal issues, an appellate court should not have to conduct an independent review of the record. Hunt's Brief at 40-42.

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[2] In addition, the restriction on other-acts evidence does not apply to the principal purpose for which the prosecutor sought to use the evidence: to permit the jury to assess the credibility of recanting witnesses, not to substantively prove Hunt's guilt. Rule 904.04(2) precludes the use of other-acts evidence "to prove the character of a person in order to show that the person acted in conformity therewith." Even in *Whitty v. State*, 34 Wis.2d 278, 292, 149 N.W.2d 557 (1967), this court characterized this restriction as a "rule against the admission of prior misconduct *as bearing on the issue of guilt*." *Id.* at 293 (emphasis added). All of the illustrative examples in Rule 904.04(2) of permissible uses relate to substantively proving a defendant's guilt. Here, to the extent the prosecutor used the other-acts evidence to show the context for the witnesses' recantations and thereby allow the jury to assess their credibility, the evidence operated neither to prove Hunt acted in conformity with his character nor to substantively prove his guilt. Consequently, the circuit court did not err by not including a reference to "context" as a permissible use of the evidence.

He does not offer *any* authority for the adoption of such an indefinite standard. Indeed, this standard necessarily implies that the more complex the case and the greater the number of issues involved, the less an appellate court's obligation to prevent the waste of judicial resources by conducting an independent review that could avoid an unnecessary retrial. The "too many notes"[3] criterion, untethered from any legal or logical justification, serves as an invitation to standardless, arbitrary appellate decision-making. This court should reject Hunt's proposal.

III. AN INDEPENDENT REVIEW WOULD HAVE UPHELD THE CIRCUIT COURT'S DECISION.

The State charged Hunt with a collection of crimes against a child (Tiffany) during the period running form December 8, 1993 through September 21, 1999: four counts of first-degree sexual assault of a child (including one count of sexual assault causing pregnancy), and one count of exposing a child to harmful material (8:1). The State also charged Hunt with one count of second-degree sexual assault "by use and threat of use of force or violence" (8:1-2) against Angelica Johnson in 1999.

A. Permissible Purpose.

The prosecutor offered the other-acts evidence for several permissible purposes (16:3-4; 33; Pet-Ap. 116-117a): context (a purpose even the court of appeals acknowledged as permissible), intent, motive, state of mind, and "as part of the corpus of the crimes with which the defendant is charged."

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[3] *Amadeus* (Warner Bros. 1984) (Emperor Joseph II characterizing Mozart's music as having "too many notes" and insisting that Mozart "[c]ut a few") (script available online at http://www.godamongdirectors.com/scripts/Amadeaaaus.txt).

Notably, Hunt focuses exclusively on the other-acts evidence introduced regarding wife Ruthie Hunt. Hunt's Brief at 43-45. In doing so, he rails about evidence of other acts of violence, but remains utterly silent about the evidence of sexual abuse against Ruthie (76:47). He also does not deal in any respect with the evidence concerning acts of sexual abuse directed at stepdaughter Jennifer Marks (16:3; 73:178; Pet-Ap. 116) and stepdaughter Cleopatrick Marks (16:3; 73:178; 76:152-54, 169; Pet-Ap. 116). Moreover, Cleopatrick told the jury, "I was about twelve" when the sexual abuse began (76:154), one year younger than Tiffany when Hunt began his sexual assaults on her.

The evidence of sexual abuse of other family members, particularly other minors, served to provide insight into Hunt's motive and state of mind when committing four of the six crimes against Tiffany. The evidence of violence and drug abuse showed the context in which the crimes occurred. As the prosecutor noted, violence and drug use routinely accompanied the sexual assaults and served as an integral component of the charged crimes. Count Six, in fact, charged the "use and threat of use of force or violence" to commit sexual assault against an adult, Angelica (8:1-2).

When the evidence ended, the circuit court itself noted that the consistency of the evidence satisfied an additional permissible purpose: "preparation or plan" (76:256; Pet-Ap. 135). The other-acts evidence showed that Hunt used drug-enhanced threats and violence to maintain a reign of terror in the Hunt collective and to use sexual abuse as both the means and prerogative of control. The plan evidenced by the other acts also helped the jury both understand the context of the crimes and evaluate the credibility of the recanting witnesses.

The evidence also showed opportunity. As the court noted after hearing all the evidence, the evidence showed not just that Hunt had access to the victims by virtue of their presence in the household, but that he used the vio-

lence and threats as a mechanism for manufacturing the opportunities to commit his crimes (76:1, 271-72; Pet-Reply-Ap. 205-209).

In short, the other-acts evidence qualified for not just one permissible purpose, *Murphy*, 188 Wis.2d at 518, but multiple permissible purposes.

B. Relevance.

The other-acts evidence clearly satisfied the relevance criteria of Rule 904.01: the evidence "relate[d] to a fact or proposition . . . of consequence to the determination of the action" and had "probative value, that is, . . . a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence." *Sullivan*, 216 Wis.2d at 772.

Hunt hardly contests the relevance of the other-acts evidence. Mainly, he complains that the State offered too much of it. Hunt's Brief at 46. In addition, he focuses on the alleged irrelevance of the evidence to Tiffany's knowledge, ignoring the clear — even obvious — relevance of the evidence to making Hunt's guilt more or less probable and to assessing witness credibility.

C. Probativeness Not Substantially Outweighed By Unfair Prejudice.

Hunt correctly notes that the other-acts evidence "pervaded every aspect of the trial." Hunt's Brief at 47. Pervasiveness, however, does not translate into *unfair* prejudice or into unfair prejudice that *substantially* outweighs probativeness.

The evidence pervaded the testimony because the acts pervaded the crimes and pervaded the environment in which those crimes occurred. The pervasiveness bore not on the issue of unfair prejudice, but on probativeness: the pervasiveness of the other acts substantially enhanced

their probativeness, not their allegedly unfair prejudicial effect.

Hunt blames the circuit court for not fashioning an adequately stringent jury instruction. Notably, he agreed to the instruction he now laments and did not ask for a different one: offered the opportunity to create an instruction of the sort he now claims he wanted, he declined (76:259; Pet-Ap. 138).

In short, the other-acts evidence operated against Hunt's interest (as any prosecution evidence should), but the evidence did not create any unfair prejudice or any unfair prejudice substantially outweighing the probative value of that evidence.

IV. THE COURT OF APPEALS ERRED WHEN IT REVERSED ALL THE COUNTS ON WHICH THE JURY CONVICTED HUNT.

The State did not raise harmless error earlier because it did not have any reason to do so. The issue of harmlessness did not arise until the appellate court reversed Count 4, Hunt's conviction for first-degree sexual assault of a child that resulted in her pregnancy.

The State does not — and did not — assert harmless error with respect to the other-acts evidence. If this court concludes the circuit court erred in admitting the other-acts evidence, the State agrees that error would not qualify as harmless as to other counts.

But the other-acts evidence, regardless of its pervasiveness, did *not* have any impact on Count 4, and this court should treat any error as harmless in this context.

The harmlessness has two sources. First, at trial, the State's entire proof on Count 4 rested on unrefuted DNA evidence. The supporting testimony came from technicians unaffected by any of the other-acts evidence. In

closing arguments, neither the State nor Hunt adverted to any other-acts evidence in supporting or attacking this count (77:44, 77, 79). Even without any of the other evidence in the trial, the jury would have convicted on this count.

Second, Hunt devotes his attack on the State to asserting that the other-acts evidence fatally infected the jury's decision on this count. Hunt's Brief at 52-56. He gets the relationship precisely backwards here. The other-acts evidence did not improperly taint the proof on this count. Rather, the DNA evidence — scientific, averred by disinterested technicians, compelling, and unrefuted — buttressed the credibility of the other-acts evidence and substantially enhanced the probativeness of that evidence (and correspondingly diminished any of its allegedly unfair prejudice).

Whatever difficulties a court might encounter disentangling the effect of improperly admitted other-acts evidence in other cases, those difficulties do not exist here. By any standard, the other-acts evidence did not cause Hunt any harm on Count 4. *State v. Harvey*, 2002 WI 93, ¶ 49, 254 Wis.2d 442, 647 N.W.2d 189 ("harmless error" test); *State v. Dyess*, 124 Wis.2d 525, 543, 370 N.W.2d 222 (1985) (same).

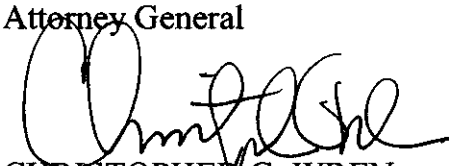
CONCLUSION

For the reasons offered in the State's briefs, this court should reverse the court of appeals' decision, affirm the circuit court's admission of the other-acts evidence, and remand for further proceedings.

Date: March 10, 2003.

Respectfully submitted,

PEGGY A. LAUTENSCHLAGER
Attorney General



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CERTIFICATION

In accord with Wis. Stat. § (Rule) 809.19(8), I certify that this brief satisfies the form and length requirements for a reply brief and appendix prepared using a proportional serif font: minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per line, and a length of 2,988 words.

CHRISTOPHER G. WREN

APPENDIX

INDEX TO APPENDIX

275 CAUTIONARY INSTRUCTION: EVIDENCE OF OTHER CRIMES, WRONGS, ACTS [REQUIRED IF REQUESTED][1] — § 904.04(2)

Evidence has been received regarding other (crimes committed by) (conduct of) (incidents involving) the defendant for which the defendant is not on trial.

Specifically, evidence has been received that the defendant (describe act). If you find that this conduct did occur, you should consider it only on the issue(s) of [CHOOSE THOSE THAT APPLY][2] (motive) (opportunity) (intent) (preparation or plan) (knowledge) (identity) (absence of mistake or accident) (_____).[3]

You may not consider this evidence to conclude that the defendant has a certain character or a certain character trait and that the defendant acted in conformity with that trait or character with respect to the offense charged in this case. The evidence was received on the issue(s) of [CHOOSE FROM THE FOLLOWING; MORE THAN ONE MAY APPLY][4]

[motive, that is, whether the defendant has a reason to desire the result of the crime.][5]

[opportunity, that is, whether the defendant had the opportunity to commit the offense charged.]

[intent,[6] that is, whether the defendant acted with the state of mind that is required for this offense.]

[preparation or plan,[7] that is, whether such other conduct of the defendant was part of a design or scheme that led to the commission of the offense charged.]

[knowledge,[8] that is, whether the defendant was aware of facts that are required to make criminal the conduct alleged as the offense.]

[identity,[9] that is, whether the prior conduct of the defendant is so similar to the offense charged that it tends to identify the defendant as the one who committed the offense.]

[absence of mistake or accident,[10] that is, whether the defendant acted with the state of mind required for this offense.]

[CONTINUE WITH THE FOLLOWING IN ALL CASES]

You may consider this evidence only for the purpose(s) I have described, giving it the weight you determine it deserves. It is not to be used to conclude that the defendant is a bad person and for that reason is guilty of the offense charged.

COMMENT

Wis JI-Criminal 275 and comment were originally published in 1978 and revised in September 1983 and 1989. This revision involved nonsubstantive editorial changes and was approved by the Committee in December 1991.

This instruction is for use where evidence of other crimes or other acts is admitted for an acceptable purposes under § 904.04(2). A cautionary instruction for evidence of prior convictions admitted to impeach a defendant is provided in Wis JI-Criminal 327.

Before evidence of other acts is admitted, the trial court must determine that it is offered for an acceptable purpose under § 904.04(2), that it is relevant, and that its probative value is not outweighed by danger of unfair prejudice. See Wis JI-Criminal 275.1 for a discussion of general issues related to determining the admissibility of other acts evidence. (The admission of other acts evidence is one of the most commonly litigated issues in criminal cases. The decisions cited here and in Wis JI-Criminal 275.1, while numerous, are not intended to be a complete catalog of all cases dealing with other acts evidence.)

1. Whenever evidence has been admitted for a limited purpose, § 901.06 provides that a cautionary instruction must be given upon request.

The Wisconsin Supreme Court has held that the trial judge is under no obligation to give such an instruction in the absence of a request by the defendant [Hough v. State, 70 Wis.2d 807, 817, 235 N.W.2d 534 (1975)]. The basis for the decision in Hough was a recognition that it may have been a tactical

decision by the defense not to request an instruction, out of a desire not to call further attention to the prior act. However, the absence of a curative or limiting instruction has been considered by the court in finding that admission of prior-crimes evidence constituted reversible error. State v. Spraggin, 77 Wis.2d 89, 101, 252 N.W.2d 94 (1977). It may be desirable, therefore, for the trial judge to inquire of the defense whether a cautionary instruction is requested and, if the defendant's tactical decision is not to request the instruction, to make a record of that decision. The trial judge may also wish to consider giving the instruction, or a variation thereof, at the time the other-crimes evidence is admitted in addition to the instruction given at the close of the case.

2. Evidence of other crimes or conduct may be admissible under more than one of the exceptions to the general rule that such evidence is not admissible to prove that the defendant acted in conformity with his generally bad character. Section 904.04(2) and Whitty v. State, 34 Wis.2d 278, 148 N.W.2d 557 (1967). Care must be taken to assure that the evidence does in fact fit one of the recognized exceptions, State v. Spraggin, 77 Wis.2d 89, 252 N.W.2d 94 (1977), or that it is admissible for some other acceptable purpose. See note 3, below. A discussion of the individual issues on which other-crimes evidence is admissible is found in Slough and Knightly, "Other Vices, Other Crimes," 41 Iowa L. Rev. 325 (1956).

3. In this blank, name the purpose for which the evidence was admitted, if one of the named exceptions does not apply. The Wisconsin Court of Appeals has held that the exceptions listed in § 904.04(2) are "merely illustrative and not exclusive." State v. Kaster, 148 Wis.2d 789, 797, 436 N.W.2d 891 (Ct. App. 1989). See discussion in Wis JI-Criminal 275.1.

The following have been recognized as acceptable purposes not listed in § 904.04(2):

— to show the "context" of the charged offense, State v. Seibert, 141 Wis.2d 753, 761, 416 N.W.2d 900 (Ct. App. 1987).

— to show the defendant's state of mind. Hammen v. State, 87 Wis.2d 791, 798, 275 N.W.2d 709, 713 (1979); State v. Kuta, 68 Wis.2d 641, 644-45, 229 N.W.2d 580, 582 (1975).

— to prove anything other than "the character of the person in order to show that he acted in conformity therewith," State v. Shillcutt, 116 Wis.2d 227, 235, 341 N.W.2d 716 (Ct. App. 1983), affirmed on other grounds, 119 Wis.2d 788, 350 N.W.2d 686 (1984).

4. See note 2, supra, regarding the applicability of more than one exception. See note 3, supra, regarding admissibility for a purpose not covered by a named exception.

5. Wis JI-Criminal 175 provides an instruction on motive and may be included here. Or, if there is other evidence of motive, it may be preferable to give Wis JI-Criminal 175 at a different place. For cases where evidence of prior crimes was admitted to show motive, see State v. Tarrell, 74 Wis.2d 647, 247 N.W.2d 696 (1976), Holmes v. State, 76 Wis.2d 259, 251 N.W.2d 56 (1977), Hendrickson v. State, 61 Wis.2d 275, 212 N.W.2d 481 (1973), and Kelly v. State, 75 Wis.2d 303, 249 N.W.2d 800 (1977).

6. For cases where the admission of prior-crimes evidence on the issue of intent is discussed, see Vanlue v. State, 96 Wis.2d 81, 291 N.W.2d 467 (1980), State v. Spraggin, State v. Tarrell, and Hendrickson v. State, supra. Evidence of crimes committed after the charged crime may be relevant to show intent. Barrera v. State, 99 Wis.2d 269, 298 N.W.2d 820 (1980). State v. Pharr, 115 Wis.2d 334, 340

N.W.2d 498 (1983). However, intent must be an issue in the case for this exception to apply. State v. Danforth, 129 Wis.2d 187, 385 N.W.2d 125 (1986).

7. For cases where the admission of prior-crimes evidence on the issue of preparation or plan is discussed, see Haskins v. State, 97 Wis.2d 408, 294 N.W.2d 25 (1980), Spraggin, Tarrell, and Hendrickson, at note 5, supra.

8. See State v. Johnson, 74 Wis.2d 26, 245 N.W.2d 687 (1976).

9. The classic case where prior-crimes evidence was admitted to show identity is Whitty v. State, 34 Wis.2d 278, 148 N.W.2d 557 (1967). Also see Sanford v. State, 76 Wis.2d 72, 250 N.W.2d 348 (1976), and Hough v. State, 70 Wis.2d 807, 235 N.W.2d 534 (1975).

10. Evidence of the defendant's prior acts of hostility and aggressiveness was admitted as relevant to absence of mistake in King v. State, 75 Wis.2d 26, 248 N.W.2d 458 (1976).

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY

STATE OF WISCONSIN,

Plaintiff, Case No. 99-CF-4897

-vs-

ORIGINAL

JOHN P. HUNT,

Defendant.

JURY TRIAL

June 22, 2000

Proceedings Held Before The
Honorable DENNIS P. MORONEY
Circuit Court Judge
Milwaukee County, Branch 20

CHARGE: First Degree Sexual Assault of a Child - Two Counts, Repeated Sexual Assault of Same Child, First Degree Sexual Assault Great Bodily Harm, Expose Child to Harmful Materials, Second Degree Sexual Assault Use of Force

APPEARANCES:

MIRIAM FALK
Assistant District Attorney
Appeared on behalf of the State of Wisconsin.

DAVID ZIEMER
Attorney at Law
Appeared on behalf of the Defendant.

Defendant Present in Court

Susan M. Havens, CPR, RPR
Official Reporter

THE COURT: I'll have to look. I'll have it ready for you tomorrow.

MS. FALK: Okay. Other than that, I am not thinking of anything else.

THE COURT: All right. Mr. Ziemer?

MR. ZIEMER: Okay. Regarding the cautionary instruction, I had objected earlier when, I don't know, when we were discussing these before as far as the issue of absence of mistake or accident, and I don't believe that's appropriate in this case. I don't think that should be included.

THE COURT: State?

MR. ZIEMER: Or opportunity for that matter.

THE COURT: Why wouldn't opportunity not be there? Just tell me that. They're in the same household.

MR. ZIEMER: There's no dispute they're in the same household.

THE COURT: Yeah, but the accessibility to the children, you heard the one person say today everything that happened to her happened when the mother was gone. You brought the other people down one at a time from upstairs and allegedly the events occurred with Angelica and/or Tiffany, you know. I

mean, he would create opportunity for himself away from the other people. I mean, that in my mind is certainly all those three things, you know. Now, the issue before us was whether it was plan or absence of mistake or plan. That was, you know --

MR. ZIEMER: Well, that was the big one that the Court --

THE COURT: I didn't know what the evidence was, though, at the time. Now I've heard the evidence and now it certainly seems to me that these aren't just absence of mistake or accident, it was either part of a concerted plan and certainly other than a mistake or plan even though everything from his side of the fence is they were mistaken or just lying.

MS. FALK: And I agree with that and think that really came out really strong at the defendant's testimony where he was trying to explain the hugging things and why he doesn't stay around the girls who are grabbing at his genitals now. I think that should stay in.

THE COURT: Especially with how the totality of the evidence came in. I didn't hear any of this stuff before. Now whatever I give on the instructions has got to be based on only what the

evidence has been that has come in, and based on all those reasons both from what I heard from both, like for example, Cleopatrick primarily and also certainly the fact of Tiffany based on her inconsistent/consistent statement that she'd be called down periodically and all those reasons I just indicated, it wasn't done in a haphazard way, it was done pursuant to his desires to get 'em into a private place where he was alone with them and then do what he wished, if that's what the jury wants to believe; if they want to believe him, he did none of these things; but the only thing that it would directly be in opposition to any plan to be with anyone, in fact, just the opposite would be because he wouldn't even want to hug 'em for fear that he'd be suggesting -- he'd be accused of getting a hard-on or otherwise they'd want to go into his pockets to get change and God knows what they'd do in there as well.

So I mean, that's what the record showed. So certainly I think it's replete with that type of inuendo. And anyway -- So I'm going to leave that. I'll deny that request, you know, based on the way the evidence came in. That's all I'm saying.

Anything else?

MR. ZIEMER: No further requests.

THE COURT: Except for the -- I will present -- I will create one more copy of twelve-o-one-A with that additional language in there and I will look for the prior inconsistent statement one and I will do a two-fifty-five which makes clear these dates. I think that would be helpful for the jury and instructive for them.

And then we'll see you here tomorrow morning to argue.

Okay. Thank you.

MS. FALK: Thank you.

(Proceedings concluded.)

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